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TRANSCRIPT OF RECORD.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1889.

No. 1367.

AMELIA A. GUNTHER AND GEORGE A. GUNTHER, AS EXECUTORS AND TRUSTEES OF THE LAST WILL AND TESTAMENT OF C. GODFREY GUNTHER, DECEASED, PLAINTIFFS IN ERROR,

vs.

THE LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

FILED OCTOBER 15, 1889.

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a Supreme Court of the State of New York, County of Kings.

CHARLES GODFREY GUNTHER, Plaintiff,
against
THE LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY, Defendant.
} Petition.

To the supreme court of the State of New York:

The petition of the Liverpool and London and Globe Insurance Company respectfully shows—

That your petitioner is the defendant in this suit, and that the same was brought by Charles Godfrey Gunther, as plaintiff, on or about the 23d day of December 1879, in the supreme court of the State of New York for the county of Kings, and that at the time of bringing this suit the said plaintiff was and now is a citizen of the State of New York, and that your petitioner was not at the time of bringing this suit and is not now a citizen of the State of New York, but was and now is a citizen and subject of England, in the Kingdom of Great Britain and Ireland.

And your petitioner further respectfully shows that at the time when this suit was brought there was and now is a controversy therein between a citizen of a State and a foreign citizen or subject, to wit, the said plaintiff, the said plaintiff residing in the
b State of New York and the said Liverpool and London and Globe Insurance Company, defendant, being a foreign corporation or company organized and existing under and by virtue of the laws of the Kingdom of Great Britain and Ireland, and further that the said plaintiff claims in the summons and complaint in this suit as damages against your petitioner the sum of twenty-nine thousand eight hundred dollars, with interest from August 16th, 1879, and that the matter in dispute exceeds the sum of five hundred dollars, exclusive of costs.

That this cause has not been tried, but is at issue and is now pending for trial in the county of Kings at this March circuit term, 1880, and that this said term is the term of this court at which this said cause could be first tried.

That your petitioner desires to remove this suit before trial thereof into the next circuit court of the United States for the eastern district of New York, being the district where said suit is pending, in the second circuit, in pursuance of the Revised Statutes of the United States and of the act of Congress entitled "An act to determine the jurisdiction of circuit courts of the United States and to regulate the removal of causes from State courts and for other purposes" (approved March 3d, 1875), and that your petitioner is ready and willing to make and file herewith a bond with good and sufficient surety for its entering in such circuit court on the first day of its session next after the filing of this petition and after the order of this court removing said suit to the said circuit court a copy of

the record in such suit and for paying all costs that may be
c awarded by said circuit court if said court shall hold that said suit was wrongfully or improperly removed thereto, and for doing all other acts and things required to be done by the Revised Statutes of the United States and by the said act of Congress in such case made and provided.

And it offers herewith its bond, executed by Charles C. Halsey, of 928 Madison avenue, New York, and Francis P. Proctor, of Brooklyn, New York, as sureties, in the penal sum of five hundred dollars, conditioned that your petitioner shall enter in such circuit court on the first day of its session after the filing of this petition and after the order removing said suit to the said circuit court a copy of the record in such suit, and for doing all other acts that may be awarded by said circuit court if said court shall hold said suit was wrongfully or improperly removed thereto, and for doing such other appropriate acts as by the statutes of the United States and by the said act of Congress in such case made and provided are required to be done.

And your petitioner therefore prays that the said bond be accepted as good and sufficient surety according to said provisions of law, and that said suit may be removed into the next circuit court of the United States to be held in the eastern district of New York, in the second circuit, pursuant to the statute made and provided, and that no further proceedings may be had therein in this court.

And your petitioner will ever pray, &c.

Dated March 29th, 1880.

d THE LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY,
JAS. E. PULSFORD, *Resident Manager.*

BUTLER, STILLMAN & HUBBARD,
Attorneys for Petitioner.

STATE OF NEW YORK, }
City and County of New York, } ss:

James E. Pulsford, being duly sworn, deposes and says that he is the resident manager of the petitioner above named; that he has read the said petition and knows the contents thereof, and that the same is true except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

JAS. E. PULSFORD.

Subscribed and sworn to before me this 29th day of March, 1880.
JOHN NOTMAN,
Notary Public, Kings Co., N. Y.

With cert. in N. Y. Co.

e Supreme Court of the State of New York, County of Kings.

CHARLES GODFREY GUNTHER, Plaintiff,
against
THE LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY, Defendant. } Bond.

We, The Liverpool and London and Globe Insurance Company above named, as principal, and Charles C. Halsey, of 928 Madison avenue, New York, and Francis P. Proctor, of 11 St. James Place, Brooklyn, New York, as sureties, are held and firmly bound, jointly and severally, unto Charles Godfrey Gunther, above named, in the sum of five hundred dollars lawful money of the United States of America, to be paid to the said Charles Godfrey Gunther or to his heirs, executors, administrators, or assigns; for which payment, well and truly to be made, we hereby bind ourselves, heirs, executors, and administrators firmly by these presents.

Sealed with our seals. Dated the 29th day of March, 1880.

Whereas a suit was brought on or about the 23d day of December, one thousand eight hundred and seventy-nine, in the supreme court of the State of New York, in the county of Kings, by the said Charles Godfrey Gunther against the said Liverpool and London and Globe Insurance Company, and the same is now pending for trial in said supreme court of the State of New York and is removable into the circuit court of the United States for the eastern district of New York, in the second circuit, under the Revised Statutes of the United States and under the act of Congress entitled "An act to determine the jurisdiction of circuit courts of the United States and to regulate the removal of causes from State courts, and for other purposes;" approved March 3, 1875.

f

And whereas the said Liverpool and London and Globe Insurance Company has filed its petition in the said supreme court for the removal of the said suit into the next circuit court of the United States to be held in the eastern district of New York pursuant to the said statute of the United States in such case made and provided:

Now, therefore, the condition of this obligation is such that if the above-bounden "The Liverpool and London and Globe Insurance Company" or its successors shall enter or cause to be entered in the circuit court of the United States for the eastern district of New York, on the first day in its session next ensuing after the filing of the said petition and of the order of the said supreme court of the State of New York for the removal of said suit into the said circuit court, a copy of the record in such suit and shall pay all costs that may be awarded by the said circuit court if the said court shall hold that such suit was wrongfully or improperly removed thereto or cause to be done such other appropriate acts as by the Revised Statutes of the United States are required to be done upon the removal of a suit into the United States circuit court, then

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the above obligation to be void; otherwise to remain in full force and virtue.

THE LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY,
JAS. E. PULSFORD, [L. S.]
Resident Manager.
C. C. HALSEY. [L. S.]
F. P. PROCTOR. [L. S.]

In the presence of—
JOHN NOTMAN.

STATE OF NEW YORK, }
City and County of New York, } ss:

On this 29th day of March, 1880, before me came James E. Pulsford, with whom I am personally acquainted, who, being by me duly sworn, says that he resides at South Orange, New Jersey; that he is the resident manager of the Liverpool and London and Globe Insurance Company, the corporation or company described in and which has executed the foregoing bond; that the seal affixed to said bond is the seal of the said Liverpool and London and Globe Insurance Company and was by him affixed thereto by due authority from said company, and that by like authority he subscribed his name thereto as such resident manager.

JOHN NOTMAN,
Notary Public, Kings Co., N. Y.

With cert. in N. Y. Co.

h STATE OF NEW YORK, }
City and County of New York, } ss:

Charles C. Halsey, being duly sworn, says that he is one of the sureties named in the foregoing obligation; that he is a resident of the State of New York and a householder therein, and is worth the sum of one thousand dollars over all his just debts and liabilities and exclusive of property exempt by law from execution.

C. C. HALSEY.

Sworn and subscribed to before me this 29th day of March, 1880.
JOHN NOTMAN,
Notary Public, Kings Co., N. Y.

Cert. filed in N. Y. Co.

STATE OF NEW YORK, }
City and County of New York, } ss:

Francis P. Proctor, being duly sworn, says that he is one of the sureties named in the foregoing obligation; that he is a resident of the State of New York and a householder therein, and is worth the sum of one thousand dollars over all his just debts and liabilities and exclusive of property exempt by law from execution.

F. P. PROCTOR.

Subscribed and sworn to before me this 29th day of March, 1880.
JOHN NOTMAN,
Notary Public, Kings Co.

Cert. in N. Y. Co.

i STATE OF NEW YORK, } ss:
City and County of New York, }

I certify that on this 29th day of March, 1880, before me personally appeared Charles C. Halsey and Francis P. Proctor, to me known and known to me to be the same persons described in and who executed the foregoing bond and who severally acknowledged to me that they executed the same.

JOHN NOTMAN,
Notary Public, Kings Co., N. Y.

With cert. in N. Y. Co.

k At a special term of the supreme court of the State of New York in and for the county of Kings, held at the court-house, in the city of Brooklyn, on the 29th day of March, 1880.

Present: Hon. Jasper W. Gilbert, justice.

CHARLES GODFREY GUNTHER, Plaintiff,
against
THE LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY, Defendant. } Order.

On reading and filing the annexed petition of the Liverpool and London and Globe Insurance Company, verified on the 29th day of March, 1880, praying for the removal of this suit into the circuit court of the United States for the eastern district of New York, in the second circuit, in pursuance of the laws of the United States relating to the removal of causes from the State courts; and upon filing the bond, with good and sufficient surety, offered by said defendant according to the requirements of said laws, on motion of Butler, Stillman & Hubbard, attorneys for said defendant, it is ordered that said bond, with good and sufficient surety, and said petition be accepted,
l and that said suit be removed into the circuit court of the United States for the eastern district of New York, in the second circuit, and that no further proceedings be had in this cause in this court.

Granted March 29, 1880.

CHAS. B. ELLIOTT, *Clk.*

Enter.
J. W. G.

m U. S. Circuit Court, Eastern District of New York.

CHARLES GODFREY GUNTHER
vs.
THE LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY. } Rule on Removal, April 7, 1880.

This cause having been originally brought in the supreme court

of the State of New York in and for the county of Kings and having been removed to this court on the application of the defendant and the defendant having this day filed a copy of the record in this action in this court, now, on motion of Butler, Stillman & Hubbard, defendant's attorneys—

Ordered, That this cause do proceed in this court as if the same had originally been brought there by original process, and that the appearance of Butler, Stillman & Hubbard, attorneys for the defendants, be, and the same is hereby, entered.

1 Supreme Court.

CHARLES GODFREY GUNTHER, Plaintiff, *against* THE LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY, Defendant. } The Plaintiff Desires the Trial to be Had in the County of Kings. Summons, with Notice.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer judgment will be taken against you by default for the relief demanded in the complaint.

Dated December 22d, 1879.

GEORGE H. FORSTER,
Plaintiff's Attorney, No. 58 Wall Street, New York City.

P. O. address, 58 Wall street, New York city.

Notice.

Take notice that upon your default to appear or answer the above summons judgment will be taken against you for the sum of twenty-nine thousand eight hundred dollars, with interest from August 16, 1879, and with costs of this action.

GEORGE H. FORSTER,
Plaintiff's Attorney.

2 Supreme Court of the State of New York.

CHARLES GODFREY GUNTHER *against* THE LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY. } The Plaintiff Desires the Trial to be Had in the County of Kings.

The plaintiff complains of the defendant and alleges on his information and belief:

First. That the defendant is a foreign corporation duly created and existing under the laws of Great Britain, but having an office for the transaction of fire insurance business in the city of New York, and that at said office, at the city of New York, said defend-

ant, on the 16th day of November, 1877, issued its policy of insurance, dated that day, No. 22,559.26, whereby it witnessed that this plaintiff, as owner, and Thompson N. Hollister and Delos B. Sackett, trustees and mortgagees, had paid to said defendant the sum of two hundred and thirteen dollars for the insurance against loss or damage by fire of the property hereinafter described to the amount of $21,300; that said property was included in three mortgages as follows: One dated the 14th day of November, 1877, executed by this plaintiff and his wife to Thompson N. Hollister and Delos B. Sackett, trustees of Julia C. Miner, for $10,000, payable December 1st, 1880, with interest at 7% per annum, recorded in Kings county register's office November 15th, 1877, in Liber 1391 of Mortgages, page
3 481; another dated the 14th day of November, 1877, executed by this plaintiff and his wife to Thompson N. Hollister and Delos B. Sackett, trustees of Emily G. Oliffe, for $10,000, payable December 1st, 1880, with interest at 7% per annum, recorded in Kings county register's office November 15th, 1877, in Liber 1391 of Mortgages, page 495, and the other dated the 14th day of November, 1877, executed by this plaintiff and his wife to Thompson N. Hollister and Delos B. Sackett, trustees of Frances A. Sackett, for $10,000, payable December 1st, 1880, with interest at 7% per annum, recorded in the Kings county register's office November 15, 1877, in Liber 1391, page 488; that the premises mortgaged by said three mortgages are three parcels, the first, three $\frac{577}{1000}$ acres of land in New Utrecht, county of Kings and State of New York, on the northerly side of the highway leading from New Utrecht to Gravesend; the second, nine acres of land, with the buildings and improvements thereon, adjoining the first-described parcel; the third, six $\frac{876}{1000}$ acres of land under the waters of the Bay of New York, in front of and adjacent to the lands above described; that by said policy of insurance said company agreed that from the 16th day of November, 1877, until the 15th day of July, 1878, the funds and property of the said company should be subject and liable to pay, reinstate, and make good to this plaintiff, his heirs, executors, or administrators, such loss or damage as should be occasioned by fire to the property mentioned in said policy and thereby insured as follows:

4 Not exceeding $20,000 on the two-story hotel frame building, with one-story frame kitchen and two-story frame pavilion building adjoining and communicating, situate on Gravesend Bay of Bath, Kings county, Long Island; $1,000 on the two-story frame stable occupied in part as a dwelling, and $200 on frame bathing-house and $100 on frame outhouses, loss, if any, payable to Thompson N. Hollister and Delos B. Sacket, trustees and mortgagees, subject to the clause thereto attached, by which it was declared that whenever the company shall pay the mortgagees any sum for loss under this policy and shall claim that as to the mortgagor or owner no liability therefor existed it shall at once be legally subrogated to all the rights of the mortgagees under all the securities held as collateral to the mortgaged debt to the extent of such payment; that said clause also contained a provision that said defendant, at its

option, may pay to the mortgagees the whole principal due or to grow due on the mortgage, with interest, and shall thereupon receive a full assignment and transfer of the mortgage and all other securities held as collateral to the mortgage debt; that on the 15th day of July, 1879, this plaintiff paid to said defendant and said defendant received of this plaintiff three hundred and nineteen $\frac{50}{100}$ —, being the premium on $21,300 insured under policy No. 22,559.26, which was thereby continued in force for one year, to wit, from the 15th day of July, 1879, until the 15th day of July, 1880; that on the 15th day of August, 1879, while said insurance was in force, the plaintiff sustained loss and damage to an amount exceeding the amount of $21,300, occasioned by fire to the property above mentioned and insured as aforesaid, of which due notice was duly given to said defendant, and a particular account of such loss duly signed and sworn to and rendered, and that an award was obtained *by* said defendant fixing the amount of such claim on said defendant under said policy on the 26th day of August, 1879, at the sum of $20,078.94, and that payment thereof has been duly demanded *by* said defendants, but that said defendants, although they admit that they make no defence to the legal claims of said Thompson N. Hollister and Delos B. Sackett, trustees and mortgagees, and admit that the loss sustained under said policy amounted on the 26th August, 1879, to the aforesaid sum of $20,078.94, yet they have refused and neglected to pay said amount either to the plaintiff or to said Thompson N. Hollister and Delos B. Sackett, trustees and mortgagees, but they have, under the aforesaid option claimed by them, paid to the said mortgagees the whole principal to grow due on said mortgages, with interest, and received an assignment and transfer of the said mortgages which said defendants now hold against the said premises of this plaintiff under a claim for the full amount thereof, and yet refuse to pay the loss under said policy, whereby said defendant is justly indebted to this plaintiff in the sum of $21,300, with interest from August 16, 1879.

Second. For a further and separate cause of action this plaintiff alleges, on his information and belief, that the defendant is a foreign corporation duly created and existing under the laws of Great Britain, but having an office for the transaction of fire insurance business in the city of New York, said defendant, on the 16th day of November, 1877, issued its policy of insurance dated that day, No. 22,559.27, wherein it witnessed that the plaintiff had paid to said defendant the sum of eighty-five dollars for the insurance against loss or damage by fire of the property hereinafter described to the amount of eighty-five hundred dollars.

That by said policy of insurance said company agreed that from the 16th day of November, 1877, until the 15th day of July, 1878, the funds and property of this said company should be subject and liable to pay, reinstate, and make good to this plaintiff, his heirs, executors, or administrators, such loss or damage as should be occasioned by fire to the property mentioned in said policy and thereby insured as follows: Not exceeding $6,000 on the hotel, kitchens, saloons, and bar fixtures and furniture, useful and ornamental, beds, bed-

ding, linen, wearing apparel, plate, plated ware, printed books and stones, including crockery and glassware, pictures, engravings, and their frames, billiard tables and appurtenances, piano-forte and gas fixtures; $2,000 on wines, liquors, segars, and provisions, all contained in the two-story frame hotel building, with frame kitchen and two-story frame pavilion building adjoining and communicating, situated at Bath, Kings county, Long Island; $200 on horses and cattle; $200 on carriages, wagons, carts, harness, hay, straw, food, and stable implements, and $100 on farm and garden implements, all contained in the two-story frame stable occupied in part as a dwelling—loss, if any, payable to this plaintiff.

7 That on the 15th day of July, 1879, this plaintiff paid to said defendant and said defendant received of this plaintiff one hundred and twenty-seven $\frac{50}{100}$ dollars, being the premium on $8,500 insured under policy No. 22,559.27, which was thereby continued in force one year, to wit, from the 15th day of July, 1879, until the 15th day of July, 1880; that on the 15th day of August, 1879, while said insurance was in force, this plaintiff sustained loss and damage to an amount exceeding the sum of $8,500, occasioned by fire to the property above mentioned and insured as aforesaid, of which due notice was duly given to said defendant and a particular account of such loss duly signed, sworn to, and rendered, and demanded payment of the said sum of $8,500, yet said defendant has neglected and refused to pay and still does neglect and refuse to pay the said sum of money mentioned in said policy of insurance or any part thereof, whereby said defendant is justly indebted to this plaintiff in the further sum of eighty-five hundred dollars, with interest from August 16th, 1879.

Wherefore this plaintiff demands judgment against said defendants for the aggregate sum of twenty-nine thousand eight hundred dollars, with interest from August 16th, 1879, and for his damage occasioned by said fire and for the costs of this action.

GEORGE H. FORSTER,
Plaintiff's Attorney.

8 CITY AND COUNTY OF NEW YORK, *ss:*

Charles Godfrey Gunther, being duly sworn, says that he is the plaintiff making the foregoing complaint; that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

—— ——.

Sworn to before me this — day of ——, 18—.

—— ——.

9 At a stated term of the circuit court of the United States for the eastern district of New York, in the second circuit, held at the United States court rooms, in the city of Brooklyn, on the 5th day of February, 1887.

Present: Hon. Charles L. Benedict, district judge, holding the court.

AMELIA AUGUSTA GUNTHER, as Executrix, and GEORGE A. GUNTHER, as Executor, of the Last Will and Testament of Charles Godfrey Gunther, Deceased, Plaintiffs,
against
THE LIVERPOOL AND LONDON AND GLOBE INSURANCE CO., Defendant.

On reading and filing the affidavits of John Notman and William Allen Butler, made January 28th, 1887, and the notice of motion thereto annexed to amend the tenth paragraph of the defendant's answer in this action so as to be in form as annexed to said affidavit of John Notman, with proof of due service of such papers upon the plaintiffs' attorney, and on reading and filing the affidavit of C. Bainbridge Smith on behalf of the plaintiffs, and after hearing Mr. John Notman, on behalf of the defendant, in support of said motion and Mr. C. Bainbridge Smith, on behalf of the plaintiffs, in opposition thereto, it is, on motion of Butler, Stillman & Hubbard, defendant's attorneys—

10 Ordered, That said motion be, and the same hereby is, in all respects granted, and that the defendants have leave forthwith to file and serve an amended answer setting up the matters stated and contained in the proposed tenth paragraph of the answer as annexed to the said affidavit of John Notman, and that defendant have leave to modify the averments in the answer as may be necessary by reason of the substitution of the executors of Charles Godfrey Gunther as plaintiffs in place of said Charles Godfrey Gunther, deceased.

CHAS. L. BENEDICT.

Endorsed: Order. Filed and entered February 5th, 1887.

11 United States Circuit Court, Eastern District of New York.

AMELIA AUGUSTA GUNTHER, Executrix, and GEORGE A. GUNTHER, Executor, of the Last Will of C. Godfrey Gunther, Deceased, Plaintiffs,
against
THE LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY, Defendant.
} Amended Answer.

The amended answer of the defendant, by Butler, Stillman & Hubbard, its attorneys, to the complaint in this action respectfully shows:

First. The defendant admits that it is a corporation duly created and existing under and by virtue of the laws of Great Britain and having an office for the transaction of its business in the city of New York under and in pursuance to the laws of the State of New York; and defendant further admits that on or about the 16th day of November, 1877, it issued and delivered to the plaintiffs' testator its certain policy of insurance, No. 22,559.26, upon property similar to that de-

scribed in the first article or subdivision of the complaint, but whether said policy was of the precise tenor and import described in the complaint the defendant has no knowledge or information sufficient to form a belief, and therefore leaves the plaintiffs
12 to make such proof thereof as they may be advised; and defendant further admits that the policy so issued and delivered by it was on or about the 15th day of July, 1879, renewed for the period of one year from said last-mentioned date, and defendant asks that the original of said policy, with the certificate of the last renewal thereof, be produced upon the trial of this action.

Second. The defendant has no knowledge or information sufficient to form a belief as to whether the plaintiffs' testator sustained loss and damage to the property mentioned and described in said policy in an amount exceeding the sum of $20,078.94, to wit: $18,778 on the two-story frame hotel building, with one-story frame kitchen and two-story frame pavilion building adjoining and communicating; $1,000 on the two-story frame stable; $200 on the frame bath-house, and $100 on the frame outhouses mentioned and referred to in said policy of insurance, and defendant therefore denies every allegation in that behalf in the complaint contained; and defendant avers that said above-mentioned sum of $20,078.94 was the amount of the actual damage by the fire mentioned in the complaint to the said property of the plaintiffs' testator mentioned and described in said policy, as appraised and determined by the appraisers appointed by the plaintiffs' testator and the defendant to appraise and estimate such damage without reference to any other questions or matters of difference relating to said insurance or the plaintiffs' testator's claim in respect thereto.

13 Third. The defendant is advised and believes that on or about the 15th day of August, 1879, a fire occurred on the premises mentioned and referred to in the said policy of insurance whereby loss and damage as aforesaid occurred, and the defendant admits that it received notice of such fire and loss and that papers purporting to be preliminary proofs of loss under said policy of insurance were received by it from the plaintiffs' testator, but defendant denies that said papers were in all respects as required by the terms and conditions of the said policy of insurance.

Fourth. The defendant admits that on or about the 14th day of November, 1877, the plaintiff's testator and his wife made, executed, and delivered three certain mortgages, each for $10,000 and payable December 1st, 1880, with interest at seven per cent. per annum; one to Thompson N. Hollister and Delos C. Sackett, trustees of Julia C. Minor, which was recorded in the register's office of Kings county November 15th, 1877, in Liber 1391 of Mortgages, page 481; another to Thompson N. Hollister and Delos B. Sackett, trustees of Emily G. Oliff, which was recorded in the register's office of Kings county November 15th, 1877, in Liber 1391 of Mortgages, page 495, and the third to Thompson N. Hollister and Delos B. Sackett, trustees of Frances A. Sackett, which was recorded in the register's office of Kings county November 15th, 1877, in Liber 1391 of Mortgages, page 488, which said mortgages were upon the property mentioned and referred to in said policy of insurance.

14 And the defendant avers that it was provided and agreed, among other things, in and by the terms of what is known as the mortgagee clause, which was attached to and made a part of said policy and contract of insurance, " that whenever the company shall pay the mortgagee any sum for loss under this policy and shall claim that as to the mortgagor or owner no liability therefor existed it shall at once be legally subrogated to all rights of the mortgagee, under all the securities held as collateral to the mortgage debt, to the extent of such payment, or at its option may pay to the mortgagee the whole principal due or to grow due on the mortgage, with interest, and shall thereupon receive a full assignment and transfer of the mortgage and all other securities held as collateral to the mortgage debt, but no such subrogation shall impair the right of the mortgagee to recover the full amount of his claim." And defendant further avers that immediately after the said fire above mentioned and at all times thereafter it claimed and now claims that, as to the said mortgagor and owner, no liability for any loss or damage under said policy existed or exists on its part; and defendant further avers that, under and pursuant to the aforesaid terms of said mortgagee clause, it has paid to the aforesaid mortgagees before the commencement of this action the whole principal to grow due on said three several mortgages, with interest, and has received assignments and transfers of said mortgages and of said mortgage debts from said mortgagees, and that the said mortgagees have been fully paid any and all claim or claims ever existing in their
15 favor against the defendant by reason of the said policy of insurance or of any interest of said mortgagees therein or thereunder.

Fifth. The defendant, further answering, admits that on or about the 16th day of November, 1877, it issued and delivered to the plaintiffs' testator herein its certain other policy of insurance No. 22,559.27, similar to that described in the second article or division of the complaint, but whether said policy was of the precise tenor and import described in the complaint the defendant has no knowledge or information sufficient to form a belief, and therefore leaves the plaintiffs' testator to make such proof thereof as he may be advised; and defendant further admits that the said policy, so issued and delivered by it, was, on or about the 15th day of July, 1879, renewed for the period of one year from said last-mentioned date, and defendant asks that the original of said policy, with the certificate of such renewal thereof, be produced upon the trial of this action.

Sixth. The defendant has no knowledge or information sufficient to form a belief as to whether at the time said last-mentioned policy and the renewal thereof was made as aforesaid or thereafter up to the happening of the fire mentioned in the complaint the plaintiffs' testator had an interest in the property mentioned and described in said policy, as owner or otherwise, to the amount of $8,500 or to any other amount, or as to whether said property was of the value of $8,500, or as to whether the plaintiffs' testator sustained loss or

damage by said fire to said property in the said sum of
16 $8,500 or in any other sum, and defendant therefore denies each and every allegation in that behalf, either in the complaint or elsewhere made or contained.

Seventh. The defendant further admits that a fire occurred on or about the 15th day of August, 1879, on the premises mentioned and referred to in the policy of insurance first herein referred to, and defendant admits that it received notice thereof and of alleged loss and damage to the plaintiffs' testator thereby, and that papers purporting to be preliminary proofs of loss under said second-named policy of insurance were received by it from the plaintiffs' testator, but defendant denies that said papers were in all respects as required by the terms and conditions of the said policy of insurance.

Eighth. The defendant avers that it has complied with all the terms and conditions of said contracts and policies of insurance on its part, but defendant denies that the plaintiffs' testator has complied with all the terms and conditions thereof on his part, and defendant admits that the plaintiffs' testator has demanded of it payments of the sum mentioned in the complaint, and further admits that it has refused to pay the said sum or any part thereof to the plaintiff's testator, and defendant denies that it is indebted to the plaintiff's testator in the sum mentioned in the complaint herein or in any sum or sums whatever.

Ninth. Except as in this amended answer otherwise expressly admitted or controverted, the defendant, upon information and
17 belief, denies each and every allegation in the complaint contained.

Tenth. For a separate and distinct defence to the causes of action alleged in the complaint, in addition to the matters and things hereinbefore set forth, the defendant avers that it was provided in and by the terms and conditions of said policies of insurance, among other things, as follows: "If the assured shall keep gunpowder, fireworks, nitro-glycerine, phosphorus, saltpetre, nitrate of soda, petroleum, naphtha, gasoline, benzine, benzole, or benzine varnish, or keep or use camphene, spirit gas, or any burning fluid or chemical oils, without written permission in this policy, then and in every such case this policy shall be void;" and, further, "that petroleum, rock-earth, coal, kerosene, or carbon oils of any description, whether crude or refined; benzine, benzole, naphtha, camphene, spirit gas, burning fluid, turpentine, gasoline, phosgene, or any other inflammable liquid are not to be stored, used, kept, or allowed on the above premises, temporarily or permanently, for sale or otherwise, unless with written permission endorsed on this policy, excepting the use of refined coal, kerosene, or other carbon oil for lights, if the same is drawn and the lamps filled by daylight; otherwise this policy shall be null and void."

And the defendant avers that the said conditions of insurance were broken and violated on the part of the plaintiffs' testator, among other things, in that, without the written permission of the defendants endorsed on said policies or otherwise, there were
18 stored, used, kept, or allowed on the insured premises men-

tioned and described in the said policies petroleum, gasoline, benzine, benzole, kerosene oil, burning fluid, or other inflammable liquid or liquids prohibited by said policies; and defendant further avers that the fire mentioned and referred to in the complaint originated and was caused by such storing, using, and keeping and allowance of such prohibited articles on said insured premises; and defendant further avers as a further breach of said last-mentioned condition that kerosene, carbon oil, or other inflammable liquid so stored, used, kept, or allowed on said premises as aforesaid was drawn, not by daylight, but at or after dusk or dark and with a lighted lamp or lantern near, in violation of the express terms of the said condition, and that the fire which destroyed said premises was caused by such proximity of said lighted lamp; and the defendant further avers that it is advised and believes that the said policies thereby became and were null and void.

Eleventh. For a further, separate, and distinct defence to the causes of action alleged in the complaint, in addition to the matters and things hereinbefore set forth, the defendant avers that it was further provided in and by the terms and conditions of said policies of insurance, among other things, as follows:

"If the above-mentioned premises shall be occupied or used so as to increase the risk and so remain without notice to or consent of this company in writing, or the risk be increased by any means whatever within the control of the assured without the consent of
19 this company endorsed thereon, then and in every such case this policy shall be void; and further, if during this insurance the above-mentioned premises shall be used for any trade, business, or vocation, or for storing, using, or vending therein any of the articles, goods, or merchandise denominated hazardous or extra hazardous or specially hazardous, or if the occupation of such premises be changed from one of the class denominated extra hazardous or specially hazardous to that of another of the same class, except as herein specially agreed to in writing upon this policy, then and from thenceforth, so long as the same shall be appropriated, applied, or used, this policy shall cease and be of no force or effect;" and defendant avers that the said conditions of insurance were broken and violated on the part of plaintiffs' testator, among other things, in that said insured premises were used for the storing and use of benzine or benzole or other inflammable burning liquids or fluids of the class denominated specially hazardous without the consent or agreement in writing of the defendant upon said policies or otherwise; and defendant avers that such storage and use continued up to and at the time of the fire mentioned in the complaint, and that such use materially increased the risk and was the cause or origin of the fire mentioned and referred to in the complaint; and the defendant avers that it is advised and believes that by reason of the premises the said policies ceased and became of no force or effect.

Twelfth. For a further, separate, and distinct defence to
20 the cause of action alleged in the complaint, in addition to the matters and things hereinbefore set forth, the defendant

avers that it was further provided in and by the terms and conditions of said policies of insurance, among other things, as follows:

"All frauds or attempt at fraud by false swearing or otherwise shall cause a forfeiture of all claim on this company under this policy."

And defendant avers, upon information and belief, that the said condition of insurance was broken and violated on the part of the plaintiffs' testator, among other things, in that he has falsely and fraudulently sworn in the preliminary proofs of loss under said policies served by him on the defendant that nothing had been done by or with his privity or consent to violate the conditions of insurance or render void the policies aforesaid, whereas, as the defendant is informed and believes, the plaintiffs' testator had full knowledge of and consented to the storing, using, and keeping on the insured premises mentioned and described in said policies of insurance benzine or benzole or other inflammable burning fluids or liquids prohibited by and in violation of the terms and conditions of said policies of insurance, and which rendered the same void, which facts in reference to the said violations of said conditions of insurance were unknown to the defendant until after the aforesaid fire, and the defendant avers that it is advised by reason of the premises the said policies became and were void and the plaintiffs' testator forfeited all claim on the defendant under said policies.

21 Thirteenth. For a further separate and distinct defence to the second cause of action set forth in the complaint, in addition to the matters and things hereinbefore alleged, the defendant avers that it was, among other things, provided as heretofore alleged in and by the terms and conditions of the policy of insurance mentioned and described in said second alleged cause of action in the complaint as follows:

"All fraud or attempt at fraud by false swearing or otherwise shall cause a forfeiture of all claim on this company under this policy;" and defendant avers that the said condition of insurance was broken and violated on the part of the plaintiffs' testator, among other things, in that he did not state truthfully and correctly in the papers served by him upon the defendant and purporting to be preliminary proofs of loss under said last-mentioned policy the actual cash value of the property insured or the extent of his loss or damage by the aforesaid fire, but purposely and fraudulently overstated the same; and further that he has falsely and fraudulently sworn in said proofs of loss that the said property insured under said last-mentioned policy was damaged to the amount of $10,827.19, and that the actual cash value of the property so insured at the time immediately preceding said fire was $12,000, whereas the defendant avers, upon information and belief, that the actual damage to said insured property by said fire and the actual cash value thereof at such time was very much less than the aforesaid sums, as was and is well

22 known to the plaintiffs' testator so to be, and defendant avers that it is advised and believes that by reason of the premises the said policy became void and of no effect.

Wherefore defendant demands judgment that the complaint be dismissed, with costs of this action to the defendant.

BUTLER, STILLMAN & HUBBARD,
Attorneys for Defendant.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

James E. Pulsford, being first duly sworn, deposes and says that he is resident manager and agent of the defendant herein; that he has read the foregoing amended answer and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

Deponent further says that the reason why this verification is not made by the defendant is that it is a company, none of whose officers are now within this county or State, and that deponent's information and the grounds of his belief are derived from investigations made under deponent's direction in respect to the matters and things set forth in this answer, the results of which have been fully stated and reported to deponent.

J. E. PULSFORD,
Res'd't Manager.

Sworn to before me this 5th day of February, 1887.
[L. S.] JOHN J. REILLY,
Notary Public, Kings County, N. Y.

With certificate in New York city.

23 At a stated term of the circuit court of the United States for the eastern district of New York, held in the court-rooms, at the city of Brooklyn, on the 21st day of November, 1888.

Present: Honorable E. Henry Lacombe, circuit judge.

AMELIA AUGUSTA GUNTHER, Executrix, &c., and Ano.
vs.
THE LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY.

Appearances: C. Bainbridge Smith, Esq., for plaintiffs; William Allen Butler, Esq., for defendant.

Trial ordered.

Jury drawn and sworn.

Plaintiffs' counsel offers in evidence policy of insurance on buildings.

* * * * * * *

Plaintiffs rest.

Defendant's counsel reads in evidence—

* * * * * * *

Defendant rests.

* * * * * * *

Testimony closed.

24 Defendant's counsel moves to direct the jury to find a verdict for the defendant.

Plaintiffs' counsel opposed.

Motion granted.

By direction of court the jury found a verdict in favor of the defendant.

A true extract from the minutes.

25 United States Circuit Court, Eastern District of New York.

AMELIA AUGUSTA GUNTHER, as Executrix, and GEORGE A. GUNTHER, as Executor, of the Last Will and Testament of Charles Godfrey Gunther, Deceased, Plaintiffs,

against

THE LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY, Defendant.

} Judgment.

The above-entitled action having come on regularly for trial and having been duly tried before the Hon. E. Henry Lacombe, circuit judge of this court, and a jury, at the November term (1888) of this court, and the said jury having rendered a verdict in favor of the defendant and against the plaintiffs by direction of the court on the 21st day of November, 1888, and the defendant's costs and disbursements of this action having been adjusted by the clerk of this court at the sum of $880.91, now, on motion of Butler, Stillman & Hubbard, attorneys for the defendant, it is—

Adjudged, considered, and determined that on the whole case the plaintiffs have shown no cause of action against the defendant, and that the defendant is on the merits entitled to and has judgment accordingly; and it is further—

Adjudged, considered, and determined that the defendant, Liverpool and London and Globe Insurance Company, have and
26 recover from the plaintiffs, Amelia A. Gunther, executrix, and George A. Gunther, executor, of the last will and testament of Charles Godfrey Gunther, deceased, the sum of $880.91, costs and disbursements of this action, adjusted as aforesaid.

E. HENRY LACOMBE.

Endorsed: Judgment-roll. Filed and entered August 28, 1889.

27 U. S. Circuit Court, Eastern District of New York.

AMELIA A. GUNTHER and GEORGE A. GUNTHER, as Executors and Trustees of the Last Will and Testament of C. Godfrey Gunther, Deceased, Plaintiffs,

vs.

THE LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY, Defendant.

Bond for Damages and Costs.

Know all men by these presents that we, Maximilian Fleischmann, of No. 334 Fifth avenue, in the city of New York, and Jacob

P. Baiter, of 155 West One hundred and twenty-sixth street, in the said city of New York, are held and firmly bound unto the above-named The Liverpool and London and Globe Insurance Company, defendant, in the sum of five hundred dollars, to be paid to the said The Liverpool and London and Globe Insurance Company; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 28th day of August, in the year of our Lord one thousand eight hundred and eighty-nine.

Whereas the above-named Amelia A. Gunther and George A. Gunther, as executors, &c., have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment
28 rendered in the above-entitled suit by the judge of the circuit court of the United States for the eastern district of New York:

Now, therefore, the condition of this obligation is such that if the above-named Amelia A. Gunther and George A. Gunther, executors, shall prosecute their said writ of error to effect and answer all damages and costs if they shall fail to make their plea good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

MAXIMILIAN FLEISCHMANN. [s.]
JACOB P. BAITER. [s.]

Sealed and delivered and taken and acknowledged this 28th day of August, 1889, before me—

R. H. ROBETTE.

UNITED STATES OF AMERICA,
City and County of New York, } ss:

Maximilian Fleischman, being duly sworn, doth depose and say that he is worth the sum of one thousand dollars over and above his just debts and liabilities.

MAXIMILIAN FLEISCHMANN.

Sworn to this 28th day of August, A. D. 1889, before me—
R. H. ROBETTE,
Notary Public, Kings County, N. Y.

Cert. filed in city & Co. of N. Y.

UNITED STATES OF AMERICA,
City and County of New York, } ss:

Jacob P. Baiter, being duly sworn, doth depose and say that he is worth the sum of one thousand dollars over and above his just debts and liabilities.

JACOB P. BAITER.

Sworn to this 28th day of August, A. D. 1889, before me—
R. H. ROBETTE,
Notary Public, Kings County, N. Y.

Cert. filed in city & Co. of N. Y.

29 The foregoing bond is approved as to form and sufficiency. August 28, 1889.

E. HENRY LACOMBE.

Endorsed: Bond for damages and costs. Filed 29th day of August, 1889.

30 Circuit Court of the United States of America, in the Second Circuit for the Eastern District of New York.

AMELIA A. GUNTHER and GEORGE A. GUNTHER, as Executors of the Last Will and Testament of Charles Godfrey Gunther, Deceased, Plaintiffs,

against

THE LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY, Defendant.

And now, on this day, to wit, the 21st day of November, 1888, before Hon. E. Henry Lacombe, at a circuit court held at the city of Brooklyn, in the said eastern district of New York, the aforesaid issue so joined as between the said parties, as by the record more fully appears, came on to be tried by a jury duly empanelled and sworn for that purpose, said plaintiffs being represented by C. Bainbridge Smith, their attorney and counsel, and the defendant by Butler, Stillman & Hubbard, its attorneys and counsel; and the plaintiffs, to maintain and prove the issues on their part, produced and called the following evidence and witnesses:

The plaintiffs' counsel then offered and read in evidence the policy of insurance numbered 2,255,926, bearing date the 16th day of November, 1877, and which was marked Plaintiffs' Exhibit Number 1. It is as follows:

No. 2,255,926. $21,300.

The Liverpool and London and Globe Insurance Company.

31 This policy of insurance witnesseth: That Charles Godfrey Gunther, as owner, and Thompson N. Hollister and Delos B. Sackett, trustees and mortgagees, having paid to the Liverpool and London and Globe Insurance Company the sum of $213 for the insurance against loss or damage by fire (subject to the conditions and stipulations which constitute the basis of this insurance) of the property hereinafter described, to the amount hereinafter mentioned, not exceeding upon any one article the sum specified on such article, namely, $20,000 on the two-story frame hotel building, with one-story frame kitchen and two-story frame pavilion building adjoining and communicating, situate on Gravesend, Bay of Bath, Kings county, L. I. (it is understood that the above property is to be occupied by a family when not in use as a hotel); privilege to use gasoline gas, gasometer, blower, and generator being under ground about 60 feet from main building in vault; no heat employed in process.

$1,000 on the two-story frame stable, occupied in part as a dwelling; and

$200 on frame bathing-house; and
$100 on frame outhouses, reference being had to plan filed in the office of this company.

Other insurance permitted without notice until required.

Loss, if any, payable to Thompson N. Hollister and Delos B. Sackett, trustees and mortgagees, subject to clause hereto attached; not valid unless countersigned by Beecher and Benedict, agents in Brooklyn, L. I.; twenty-one thousand three hundred
32 dollars, at 1½ per cent., P. R., $21,300. The two directors of the said company whose names are hereunto subscribed do hereby agree that from the sixteenth day of November, 1877, until the fifteenth day of July, in the year of our Lord one thousand eight hundred and seventy-eight, the funds and property of the said company shall (subject to the following conditions and stipulations, which constitute the basis of this insurance) be subject and liable to pay, reinstate, or make good to the said assured, his heirs, executors, or administrators, such loss or damage as shall be occasioned by fire to the property above mentioned and hereby insured, not exceeding in each case respectively the sum or sums hereinbefore severally specified and stated against each property: Provided always, and it is hereby declared and agreed, that this company shall not be liable to make good any loss or damage by fire which shall happen or arise by any foreign invasion, insurrection, riot, or civil commotion, or any military or usurped power, or by any explosion, earthquake, or hurricane, and the policy shall remain suspended and be of no effect in respect to any loss or damage which shall happen or arise during the period of any of these contingencies.

1. If an application, survey, plan, or description of the property herein insured is referred to in this policy such application, survey, plan, or description shall be considered a part of this contract and a warranty by the assured; and any false representation by the assured of the condition, situation, or occupancy of the prop-
33 erty, or any omission to make known every fact material to the risk, or an overvaluation or any misrepresentation whatever, either in a written application or otherwise, or if the assured shall have or shall hereafter make any other insurance on the property hereby insured or any part thereof without the consent of the company written hereon, or if the above-mentioned premises shall be occupied or used so as to increase the risk or become vacant or unoccupied and so remain without notice to and consent of this company in writing, or the risk be increased by the erection or occupation of neighboring buildings or by any means whatever within the control of the assured without the assent of this company endorsed hereon, or if it be a manufacturing establishment running in whole or in part over or extra time or running at night, or if it shall cease to be operated without special agreement indorsed on this policy, or if the property be sold or transferred, or upon a passing or entry of a decree of foreclosure, or upon a sale under a deed of trust, or if the property insured be assigned under any bankrupt or insolvent law, or any change take place in title or possession (except

in case of succession by reason of the death of the assured), whether by legal process or judicial decree or voluntary transfer or conveyance, or if this policy shall be assigned before a loss, without the consent of the company endorsed hereon, or if the interest of the assured in the property, whether as owner, trustee, consignee, factor, agent, mortgagee, lessee, or otherwise, be not truly stated in this policy, or if the assured shall keep gunpowder, fire-works,
34 nitro-glycerine, phosphorus, saltpetre, nitrate of soda, petroleum, naphtha, gasoline, benzine, benzole, or benzine varnish, or keep or use camphene, spirit gas, or any burning fluid or chemical oils without written permission in this policy, then and in every such case this policy shall be void.

2. This insurance does not apply to or cover jewels, plate, watches, musical or scientific instruments (piano-fortes in dwellings excepted), ornaments, medals, patterns, printed music, printed books, engravings, paintings, picture frames, sculpture, casts, models, or curiosities unless particularly specified in this policy. This company shall not be liable by virtue of this policy or any renewal thereof until the premium therefor be actually paid, nor for loss by theft at or after a fire, nor for money or bullion, bills, notes, accounts, deeds, evidences of debt, or securities of property of any kind, nor for any loss or damage by fire caused by means of an invasion, insurrection, riot, civil commotion, or military or usurped power, nor for any loss in buildings unprovided with good and substantial stone or brick chimneys, the absence of which has been the cause of the fire, nor in consequence of any neglect or deviation from the laws or regulations of police, where such exist, nor for any loss caused by the explosion of gunpowder or any explosive substance, nor by lightning or explosions of any kind, unless fire ensues, and then for the loss or damage by fire only, which loss shall be determined by the value of the damaged property after the casualty by explosion or lightning.

35 3. If a building shall fall, except as the result of a fire, all insurance by this company on it or its contents shall immediately cease and determine.

4. If the interest of the assured in the property be any other than the entire, unconditional, and sole ownership of the property for the use and benefit of the assured, or if the building insured stands on leased ground, it must be so represented to the company and so expressed in the written part of this policy; otherwise the policy shall be void. When property has been sold and delivered, or otherwise disposed of so that all interest or liability on the part of the assured herein named has ceased, this insurance on such property shall immediately terminate. Goods held on storage must be separately and specifically insured.

5. If, during this insurance, the above-mentioned premises shall be used for any trade, business or vocation, or for storing, using, or vending therein any of the articles, goods, or merchandise denominated hazardous or extra hazardous or specially hazardous, or if the occupation of such premises be changed from one of the class denominated extra hazardous or specially hazardous to that of

another of the same class, except as herein specially agreed to in writing upon this policy, then and from thenceforth, so long as the same shall be so appropriated, applied, or used, this policy shall cease and be of no force or effect.

6. The best endeavors of the assured shall be used in saving and protecting the property from damage at and after the fire,
36 and in case of failure so to do this company will not be liable for damage caused by such failure, and there can be no abandonment to the company of the property insured.

The use of general terms or anything less than a distinct specific agreement, clearly expressed and indorsed on this policy, shall not be construed as a waiver of any printed or written condition or restriction therein.

7. In case of any other insurance upon the property hereby insured, whether made prior or subsequent to the date of this policy, the assured shall be entitled to recover of this company no greater proportion of the loss sustained than the sum hereby insured bears to the whole amount insured thereon, without reference to the dates of the different policies or their invalidity from want of notice of this or other insurance or from the violation of any of their conditions or the insolvency of any or all the other insurance companies; and it is hereby declared and agreed that in case of the assured holding any other policy in this or any other company on the property insured, subject to the conditions of average, this policy shall be subject to average in like manner.

Reinsurance in case of loss to be settled in proportion as the sum reinsured shall bear to the whole sum covered by the reinsured company.

8. The insurance may be terminated at any time, at the option of the company, on giving notice to that effect and tendering a ratable proportion of the premium for the unexpired term of the policy. It is a part of this contract that any person other than the as-
37 sured who may have procured this insurance to be taken by this company shall be deemed to be the agent of the assured named in this policy and not of this company under any circumstances whatever or in any transaction relating to this insurance.

9. Persons sustaining loss or damage by fire shall forthwith give notice of said loss to the company, and as soon thereafter as possible render a particular account of such loss, signed and sworn to by them, stating whether any and what other insurance has been made on the same property, giving copies of the written portion of all policies thereon; also the actual cash value of the property and their interest therein, for what purpose and by whom the building insured or containing the property insured and the several parts thereof were used at the time of the loss, when and how the fire originated, and shall also produce a certificate under the hand and seal of a magistrate or a notary public (nearest to the place of the fire not concerned in the loss as a creditor or otherwise nor related to the assured) stating that he has examined the circumstances attending the loss, knows the character and circumstances of the assured, and verily believes that the assured has without fraud sustained loss

on the property insured to the amount which such magistrate or notary public shall certify. The assured shall, if required, submit to an examination or examinations under oath by any person appointed by the company, and subscribe to such examinations when reduced to writing, and shall also produce their books of account and other vouchers and exhibit the same for examina-
38 tion at the office of the company and permit extracts and copies thereof to be made. The assured shall also produce certified copies of all bills and invoices the originals of which have been lost, and shall exhibit all that remains of the property which was covered by this policy, damaged or not damaged, for examination to any person or persons named by the company, and, as a part of the preliminary proofs of loss, the assured shall, if the claim be for building destroyed by fire, procure the duly verified certificate of some reliable and responsible builder as to the actual cash value of it immediately before said fire, which shall be attached to and form a part of such proofs, and, if required so to do, shall furnish the company with plans and specifications of the buildings destroyed, which shall be duly verified by the oath of the assured.

When personal property is damaged the assured shall forthwith cause to be put in order, assorting and arranging the various articles according to their kinds, separating the damaged from the undamaged, and shall cause an inventory to be made and furnished to the company of the whole, naming the quantity, quality, and cost of each article. The amount of sound value and of damage shall be determined by mutual agreement between the company and the assured, or, failing to thus agree, the same shall then be ascertained by appraisal of each article by competent persons (not interested in the loss as creditors or otherwise nor related to the assured or sufferers), to be mutually appointed by the assured and the company, their report in writing to be made under oath before any
39 magistrate or other properly commissioned person, one-half of the appraisers' fees to be paid by the assured. The company reserves the right to take the whole or any part of the articles at their appraised value, and until such proofs, declarations, and certificates are produced and examinations and appraisals permitted by the claimant the loss shall not be payable. In case of loss on property held in trust or on commission, or if the interest of the assured be other than the entire and sole ownership, the names of the respective owners shall be set forth, together with their respective interests therein. If this policy is made payable, in case of loss, to a third party or held as collateral security, the proofs of loss shall be made by the party originally insured unless there has been an actual sale of the property insured. All fraud or attempt at fraud by false swearing or otherwise shall cause a forfeiture of all claim on this company under this policy.

But provided, in case differences shall arise touching any loss or damage after proof thereof has been received in due form, the matter shall, at the written request of either party, be submitted to impartial arbitrators, whose award in writing shall be binding on the parties as to the amount of such loss or damage, but shall not de-

cide the liability of the company under this policy; and provided further, that it shall be optional with the company to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time, giving notice of their in-
40 tention so to do within thirty days after the receipt of the proofs herein required; and in case this company elect to rebuild, the assured shall, if required, furnish plans and specifications of the buildings destroyed. The cash value of property destroyed or damaged by fire shall in no case exceed what would be the cost to the assured, at the time of the fire, of replacing the same; and in case of the depreciation of such property from use or otherwise a suitable deduction from the cash cost of replacing shall be made to ascertain the actual cash value.

10. This insurance, the risk not being changed, may be continued for such further time as shall be agreed on, provided the premium therefor is paid and endorsed on this policy or a receipt given for the same, and it shall be considered as continued under the original representation and for the original amounts and divisions unless otherwise specified in writing; but in case there shall have been any change in the risk, either within itself or by neighboring buildings, not made known to the company by the assured at the time of renewal, this policy and renewal shall be void.

11. It is furthermore hereby expressly provided and mutually agreed that no suit or action against this company for the recovery of any claim by virtue of this policy shall be sustainable in any court of law or chancery until after an award shall have been obtained fixing the amount of such claim in the manner above provided, nor unless such suit or action shall be commenced within twelve months next after the loss shall occur; and should
41 any suit or action be commenced against this company after the expiration of the aforesaid twelve months the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding.

Petroleum, rock, earth, coal, kerosene, or carbon oils of any description, whether crude or refined, benzine, benzole, naphtha, camphene, spirit gas, burning fluid, turpentine, gasoline, phosgene, or any other inflammable liquid are not to be stored, used, kept, or allowed on the above premises, temporarily or permanently, for sale or otherwise, unless with written permission endorsed on this policy, excepting the use of refined coal, kerosene, or other carbon oil for lights, if the same is drawn and the lamps filled by daylight; otherwise this policy shall be null and void.

Fences and other yard fixtures, also store furniture and fixtures, are not insured under the within policy unless separately and specifically mentioned. Frescoed work or gilding on walls or ceilings is not covered by insurance on the building, but must be separately and specifically insured.

Builders' risk.—The working of carpenters, roofers, tinsmiths, gas-fitters, plumbers, or other mechanics in building, altering, or repairing the premises named in this policy will vitiate the same

unless permission for such work be endorsed in writing hereon, except in dwelling-houses only, where five days are allowed in any one year for incidental repairs without notice or endorsement.

In witness whereof we, two of the directors of the said
42 company, have hereunto set our hands and seals this 16th day of November, in the year of our Lord one thousand eight hundred and seventy-seven.

CHARLES H. MARSHALL. [SEAL.]
ROBERT B. MINTURN. [SEAL.]

Examined.
Entered.
Countersigned.
BEECHER & BENEDICT, *Agents.*

The plaintiffs' counsel also offered and read in evidence the following, which was written on the side of the above policy number 2,255,926:

"Sept. 17, 1878.—Privileged to keep not exceeding 5 barrels of kerosene oil on said premises.

"B. & B., *Ag'ts.*"

The plaintiffs' counsel also offered and read in evidence the following, in print, which was attached to said policy number 2,255,926:

"Privileged to use kerosene oil for lights; lamps to be filled and trimmed by daylight only.

"Attached to policy 2,255,926.

"B. & B., *Ag'ts.*"

The plaintiffs' counsel also produced and read in evidence a renewal receipt of the above-mentioned policy No. 2,255,926, which is as follows:

43 PLAINTIFFS' EXHIBIT No. 2.

The Liverpoool and London and Globe Insurance Company.

No. 2546. No. 45 William street, New York.

Property insured, frame hotel and pavilion, Gravesend Bay, Kings Co., L. I.

BROOKLYN, NEW YORK, *July* 15, 1879.

Received of C. Godfrey Gunther three hundred and nineteen and $\frac{50}{100}$ dollars, being the premium on twenty-one thousand three hundred dollars insured under policy No. 2,255,926, which is hereby continued in force for one year, 1½ per cent., to wit, from the 15th day of July, 1879, until the 15th day of July, 1880, at six o'clock in the evening.

Not valid unless countersigned by Beecher & Benedict, agents, cor. Court and Montague streets, Brooklyn.

JAMES E. PULSFORD,
Resident Manager.

BEECHER & BENEDICT, *Agents.*
4—1367

The counsel for the plaintiffs then offered and read in evidence the policy of insurance number 2,255,927, bearing date the 16th day of November, 1877, and which was marked Plaintiffs' Exhibit number 3. It is as follows:

No. 2,255,927. $8,500.

The Liverpool and London and Globe Insurance Company.

This police of insurance witnesseth: That Charles Godfrey Gunther having paid to the Liverpool & London & Globe Insurance Company the sum of $85 for the insurance against loss or dam-
44 age by fire (subject to the conditions and stipulations which constitute the basis of this insurance) of the property hereinafter described, to the amount hereinafter mentioned, not exceeding upon any one article the sum specified on such article, namely:

$6,000 on hotel, kitchen, saloon and bar fixtures, and furniture, useful and ornamental, beds, bedding, linen, and wearing apparel, plate, plated ware, printed books, and stores, including crockery and glassware, pictures, engravings, and their frames, billiard tables and appurtenances, piano-forte, and gas-fixtures.

$2,000 on wines, liquors, cigars, and provisions, all contained in the two-story frame hotel building, with one-story frame kitchen and two-story frame pavilion building adjoining and communicating, situate on Gravesend, Bay of Bath, Kings county, L. I.; (it is understood that the above property is to be occupied by a family when not in use as a hotel;) privilege to use gasoline gas, gasometer, blower, and generator, being underground, about 60 feet from main building, in vault; no heat employed in process.

$200 on horses and cattle.

$200 on carriages, wagons, carts, harness, hay, straw, feed, and stable implements, and—

$100 on farm and garden implements, all contained in the two-story frame stable occupied in part as a dwelling, reference being had to plan filed in office of this company.

Other insurance permitted without notice until required; eighty-five hundred dollars, at 1½ P. R., $8,500.

Not valid unless countersigned by Beecher & Benedict,
45 agents in Brooklyn, L. I.

The two directors of the said company whose names are hereunto subscribed do hereby agree that from the 16th day of November, 1877, until the 15th day of July, in the year of our Lord one thousand eight hundred and seventy-eight, the funds and property of the said company shall (subject to the following conditions and stipulations, which constitute the basis of this insurance) be subject and liable to pay, reinstate, or make good to the said assured, his heirs, executors, or administrators, such loss or damage as shall be occasioned by fire to the property above mentioned and hereby insured, not exceeding in each case respectively the sum or sums hereinbefore severally specified and stated against each property: Provided always, and it is hereby declared and agreed, that this company shall not be liable to make good any loss or damage

by fire which shall happen or arise by any foreign invasion, insurrection, riot, or civil commotion, or any military or usurped power, or by any explosion, earthquake, or hurricane, and the policy shall remain suspended and be of no effect in respect to any loss or damage which shall happen or arise during the period of any of these contingencies.

1. If an application, survey, plan, or description of the property herein insured is referred to in this policy such application, survey, plan, or description shall be considered a part of this contract and a warranty by the assured, and any false representation by the assured of the condition, situation, or occupancy of the property, or any omission to make known every fact material to the risk,
46 or an overvaluation or any misrepresentation whatever, either in a written application or otherwise, or if the assured shall have or shall hereafter make any other insurance on the property hereby insured or any part thereof without the consent of the company written hereon, or if the above-mentioned premises shall be occupied or used so as to increase the risk or become vacant or unoccupied and so remain without notice to and consent of this company in writing, or the risk be increased by the erection or occupation of neighboring buildings or by any means whatever within the control of the assured without the assent of this company endorsed hereon, or if it be a manufacturing establishment running in whole or in part over or extra time or running at night, or if it shall cease to be operated without special agreement endorsed on this policy, or if the property be sold or transferred or upon a passing or entry of a decree of foreclosure or upon a sale under a deed of trust, or if the property assured be assigned under any bankrupt or insolvent law or any change take place in title or possession (except in case of succession by reason of the death of the assured), whether by legal process or judicial decree or voluntary transfer or conveyance, or if this policy shall be assigned before a loss without the consent of the company endorsed hereon, or if the interest of the assured in the property, whether as owner, trustee, consignee, factor, agent, mortgagee, lessee, or otherwise, be not truly stated in this policy, or if the assured shall keep gunpowder, fire-works, nitroglycerine, phosphorus, saltpetre, nitrate of soda, petroleum,
47 naphtha, gasoline, benzine, benzole, or benzine varnish, or keep or use camphene, spirit gas, or any burning fluid or chemical oils without written permission in this policy, then and in every such case this policy shall be void.

2. This insurance does not apply to or cover jewels, plate, watches, musical or scientific instruments (piano-fortes in dwellings excepted), ornaments, medals, patterns, printed music, printed books, engravings, paintings, picture frames, sculpture, casts, models, or curiosities unless particularly specified in this policy. This company shall not be liable by virtue of this policy or any renewal thereof until the premium therefor be actually paid, nor for loss by theft at or after a fire, nor for money or bullion, bills, notes accounts, deeds, evidences of debt, or securities of property of any kind, nor for any loss or damage by fire caused by means of an invasion, insurrection,

riot, civil commotion, or military or usurped power, nor for any loss in buildings unprovided with good and substantial stone or brick chimneys, the absence of which has been the cause of the fire, nor in consequence of any neglect or deviation from the laws or regulations of police where such exist, nor for any loss caused by the explosion of gunpowder or any explosive substance, nor by lightning or explosions of any kind unless fire ensues, and then for the loss or damage by fire only, which loss shall be determined by the value of the damaged property after the casualty by explosion or lightning.

3. If a building shall fall, except as the result of a fire, all
48 insurance by this company on it or its contents shall immediately cease and determine.

4. If the interest of the assured in the property be any other than the entire, unconditional, and sole ownership of the property for the use and benefit of the assured or if the building insured stands on leased ground it must be so represented to the company and so expressed in the written part of this policy; otherwise the policy shall be void. When property has been sold and delivered or otherwise disposed of, so that all interest or liability on the part of the assured herein named has ceased, this insurance on such property shall immediately terminate.

Goods held on storage must be separately and specifically insured.

5. If during this insurance the above-mentioned premises shall be used for any trade, business, or vocation or for storing, using, or vending therein any of the articles, goods, or merchandise denominated hazardous or extra hazardous or specially hazardous, or if the occupation of such premises be changed from one of the class denominated extra hazardous or specially hazardous to that of another of the same class, except as herein specially agreed to in writing upon this policy, then and from thenceforth, so long as the same shall be so appropriated, applied, or used, this policy shall cease and be of no force or effect.

6. The best endeavors of the assured shall be used in saving and protecting the property from damage at and after the fire,
49 and in case of failure so to do this company will not be liable for damage caused by such failure, and there can be no abandonment to the company of the property insured.

The use of general terms or anything less than a distinct, specific agreement, clearly expressed and indorsed on this policy, shall not be construed as a waiver of any printed or written condition or restriction therein.

7. In case of any other insurance upon the property hereby insured, whether made prior or subsequent to the date of this policy, the assured shall be entitled to recover of this company no greater proportion of the loss sustained than the sum hereby insured bears to the whole amount insured thereon, without reference to the dates of the different policies or their invalidity, from want of notice of this or other insurance or from the violation of any of their conditions or the insolvency of any or all the other insurance companies;

and it is hereby declared and agreed that in case of the assured holding any other policy in this or any other company on the property insured, subject to the conditions of average, this policy shall be subject to average in like manner; reinsurance in case of loss to be settled in proportion as the sum reinsured shall bear to the whole sum covered by the reinsured company.

8. The insurance may be terminated at any time, at the option of the company, on giving notice to that effect and tendering a ratable proportion of the premium for the unexpired term of the policy. It is a part of this contract that any person, other than the assured, who may have procured this insurance to be taken by this company shall be deemed to be the agent of the assured named in this policy and not of this company under any circumstances whatever or in any transaction relating to this insurance.

9. Persons sustaining loss or damage by fire shall forthwith give notice of said loss to the company and as soon thereafter as possible render a particular account of such loss, signed and sworn to by them, stating whether any and what other insurance has been made on the same property, giving copies of the written portions of all policies thereon; also the actual cash value of the property and their interest therein, for what purpose and by whom the building insured or containing the property insured and the several parts thereof were used at the time of the loss, when and how the fire originated, and shall also produce a certificate, under the hand and seal of a magistrate or a notary public (nearest to the place of the fire, not concerned in the loss as a creditor or otherwise nor related to the assured), stating that he has examined the circumstances attending the loss, knows the character and circumstances of the assured, and verily believes that the assured has without fraud sustained loss on the property insured to the amount which such magistrate or notary public shall certify. The assured shall, if required, submit to an examination or examinations, under oath, by any person appointed by the company, and subscribe to such examinations when reduced to writing, and shall also produce their books of account and other vouchers, and exhibit the same for examination at the office of the company, and permit extracts and copies thereof to be made. The assured shall also produce certified copies of all bills and invoices the originals of which have been lost, and shall exhibit all that remains of the property which was covered by this policy, damaged or not damaged, for examination to any person or persons named by the company, and, as a part of the preliminary proofs or loss, the assured shall, if the claim be for building destroyed by fire, procure the duly verified certificate of some reliable and responsible builder as to the actual cash value of it immediately before said fire, which shall be attached to and form a part of such proofs, and, if required so to do, shall furnish the company with plans and specifications of the buildings destroyed, which shall be duly verified by the oath of the assured.

When personal property is damaged the assured shall forthwith cause it to be put in order, assorting and arranging the various arti-

cles according to their kinds, separating the damaged from the undamaged, and shall cause an inventory to be made and furnished to the company of the whole, naming the quantity, quality, and cost of each article. The amount of sound value and of damage shall be determined by mutual agreement between the company and the assured, or, failing to thus agree, the same shall then be ascertained by appraisal of each article by competent persons (not interested in the loss as creditors or otherwise nor related to the assured or sufferers), to be mutually appointed by the assured and the company, their report, in writing, to be made, under oath, before any magistrate or other properly commissioned person, one-half of the
52 appraisers' fees to be paid by the assured. The company reserves the right to take the whole or any part of the articles at their appraised value, and until such proofs, declarations, and certificates are produced and examinations and appraisals permitted by the claimant the loss shall not be payable.

In case of loss on property held in trust or on commission, or if the interest of the assured be other than the entire and sole ownership, the names of the respective owners shall be set forth, together with their respective interests therein. If this policy is made payable in case of loss to a third party or held as collateral security, the proofs of loss shall be made by the party originally insured, unless there has been an actual sale of the property insured. All fraud or attempt at fraud by false swearing or otherwise shall cause a forfeiture of all claim on this company under this policy.

But provided, in case difference shall arise touching any loss or damage after proof thereof has been received in due form, the matter shall, at the written request of either party, be submitted to impartial arbitrators, whose award in writing shall be binding on the parties as to the amount of such loss or damage, but shall not decide the liability of the company under this policy; and provided further, that it shall be optional with the company to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time, giving notice of their inten-
53 tion so to do within thirty days after the receipt of the proofs herein required; and, in case this company elect to rebuild, the assured shall, if required, furnish plans and specifications of the buildings destroyed. The cash value of property destroyed or damaged by fire shall in no case exceed what would be the cost to the assured, at the time of the fire, of replacing the same; and, in case of the depreciation of such property, from use or otherwise, a suitable deduction from the cash cost of replacing shall be made to ascertain the actual cash value.

10. This insurance, the risk not being changed, may be continued for such further time as shall be agreed on, provided the premium therefor is paid and indorsed on this policy or a receipt given for the same, and it shall be considered as continued under the original representation and for the original amounts and divisions, unless otherwise specified in writing; but in case there shall have been any change in the risk, either within itself or by neighboring build-

ings, not made known to the company by the assured at the time of renewal this policy and renewal shall be void.

11. It is furthermore hereby expressly provided and mutually agreed that no suit or action against this company for the recovery of any claim by virtue of this policy shall be sustainable in any court of law or chancery until after an award shall have been obtained fixing the amount of such claim in the manner above provided, nor unless such suit or action shall be commenced within twelve months next after the loss shall occur; and should
54 any suit or action be commenced against this company after the expiration of the aforesaid twelve months the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding.

Petroleum, rock, earth, coal, kerosene, or carbon oils of any description, whether crude or refined, benzine, benzole, naphtha, camphene, spirit gas, burning fluid, turpentine, gasoline, phosgene, or any other inflammable liquid are not to be stored, used, kept, or allowed on the above premises temporarily or permanently, for sale or otherwise, unless with written permission endorsed on this policy, excepting the use of refined coal, kerosene, or other carbon oil for lights, if the same is drawn and the lights filled by daylight; otherwise this policy shall be null and void.

Fences and other yard fixtures, also store furniture and fixtures, are not insured under the within policy unless separately and specifically mentioned.

Frescoed work or gilding on walls or ceilings is not covered by insurance on the building, but must be separately and specifically insured.

Builders' risk.—The working of carpenters, roofers, tinsmiths, gas-fitters, plumbers, or other mechanics in building, altering, or repairing the premises named in this policy will vitiate the same, unless permission for such work be indorsed in writing hereon, except in dwelling-houses only, where five days are allowed in any one year for incidental repairs without notice or endorsement.

55 In witness whereof we, two of the directors of the said company, have hereunto set our hands and seals this 16th day of November, in the year of our Lord one thousand eight hundred and seventy-seven.

CHARLES H. MARSHALL. [SEAL.]
ROB'T B. MINTURN. [SEAL.]

Examined.
Entered.
Countersigned.

BEECHER & BENEDICT, *Agents.*

The plaintiffs' counsel also offered and read in evidence the following in print, which was attached to said policy number 2,255,927:

"Privilege to use kerosene oil for lights; lamps to be filled and trimmed by daylight only.

Attached to policy 2,255,927.

B. & B., *Agents.*"

The plaintiffs' counsel also produced and read in evidence a renewal receipt of the above-mentioned policy No. 2,255,927, which is as follows:

PLAINTIFFS' EXHIBIT No. 4.

The Liverpool and London and Globe Insurance Company.

No. 2547. No. 45 William street, New York.

Property insured, hotel and Hh. F. in hotel and Fr. pavilion, Gravesend Bay, Kings Co., L. I.

BROOKLYN, NEW YORK, *July* 15, 1879.

56 Received of C. Godfrey Gunther one hundred and twenty-seven $\frac{50}{100}$ dollars, being the premium on eighty-five hundred dollars insured under policy No. 2,255,927, which is hereby continued in force for one year, 1½, to wit, from the 15th day of July, 1879, until the 15th day of July, 1880, at six o'clock in the evening.

Not valid unless countersigned by Beecher & Benedict, agents, cor. Court and Montague streets, Brooklyn.

JAMES E. PULSFORD,
Resident Manager.

BEECHER & BENEDICT, *Agents.*

It appearing to the court and admitted by the counsel for the defendant that Charles Godfrey Gunther, the former plaintiff in this action, had departed this life before this trial, and the said action having been duly revived in the names of the above plaintiffs as his executors, the plaintiffs read the following testimony of Charles Godfrey Gunther, given by him on a former trial: "I was the owner of the property mentioned in said policies of insurance, and continued to be such owner until the present hour."

It was also agreed by and between the respective counsel for the plaintiffs and defendant that the loss on the furniture occasioned by fire *on the furniture* under policy No. 2,255,927, with interest, is $9,958.44, and on the buildings under policy No. 2,255,926, with interest up to the present date, is $31,158.20, amounting together to the sum of $41,116.64.

The plaintiffs then rested.

57 The defendant, to maintain and prove the issues on its part, produced the following witnesses and evidence:

The counsel for the defendant read in evidence the following from the record of the trial, February 9th, 1888: "It is admitted that August 15th, 1879, at the place of the fire, the sun set at fifty-eight minutes past six o'clock p. m.

LEFFERT G. WILKIN testified:

I am a dealer in oils at No. 5 Cedar street, in the city of New York. I recollect Mr. Walker, the proprietor of the Locust Grove Hotel in 1879, the husband of Mrs. Walker, who was the lessee of

the Locust Grove Hotel. I had a transaction with Mr. Walker on the 13th day of August, 1879. I sent to him on that day one barrel of kerosene and a package of benzine. The kerosene was in an ordinary kerosene barrel and painted blue on the outside and the ends white. A barrel holds from 45 to 53 gallons. It was 150 kerosene fire test; that 150 means by subjecting it to a heat of 150 degrees it will take fire; under that it will not ignite. The other package was about half a barrel; that contained 21½ gallons. The fire test of that benzine was 70—what they call 70 benzine. I am not a dealer in kerosene or benzine; I usually furnish it on orders. I am familiar with the article. It was in the neighborhood of twelve o'clock on the 13th of August, 1879, that Walker came to my place. I saw the barrel and half barrel in the afternoon of that day; the half barrel I saw on the sidewalk and the barrel of kerosene in the store.

58 Q. Who took the packages from your place?

A. It was an express company, Remsen's Express, I think, at or about three o'clock in the afternoon. The bill was made out to Mrs. Walker. (A receipt was shown witness and he says that was given by the expressman who was to take them to Locust Grove Hotel.) It was dated the 13th August, 1879. It was on one of my regular printed blanks.

The receipt was read in evidence, and marked Defendant's Exhibit "A," and is as follows: "5 Cedar street, New York, Aug. 13th, 1879. Received from L. G. Wilkin in good order, on board Remsen's Express, for Locust Grove Hotel, marked (blank), one barrel 150 kerosene, half barrel benzine."

Cross-examination the witness testifies:

I never sold Mrs. Walker any benzine before that. The package of benzine was painted blue.

Q. How was the head?

A. I think the whole package was painted blue. The kerosene I got from Haggerty & Co. The benzine I bought of Wheelock & Co., of Mr. Campbell of that firm. Mr. Walker, when he ordered the benzine, said to me that he wanted me to procure him a small package of benzine. I asked him if it would answer to-morrow; he said I must have it to-night without fail, on account of a picnic that was going to take place somewhere in the neighborhood; that is about all I can recollect. The barrel and half barrel for the kerosene and benzine I bought of Mr. Cosgrove. It is my impression there were no marks on those barrels. We never mark barrels

59 sent by express. I can tell from the paper shown me the dates of the sales that I made to Walker. There was one barrel June 11th, 1879, 50 gallons; then there were 5 gallons on the same day; that was a can. July 26, one barrel, 48 gallons; August 13, one barrel, 48½ gallons; ½ barrel benzine; 76 it is marked here. I presume that was what they call it.

know they used kerosene lamps there because I saw them used there when the pavilion was first opened. I noticed it being very dark around the pavilion — nights in the first part of 1879. I never saw any of the colored lanterns that were sent there. I saw lanterns there one night when they had kind of a picnic there—Chinese lanterns. I did not see colored railroad lanterns on the pavilion after the season had progressed sometimes, in consequence of the darkness on it, which had attracted my attention. I never saw any change in the lighting of the pavilion from the beginning of that summer to the end of it. The darkness was never remedied, so far as I saw. I saw a Chinese lantern on the pavilion at the time they had a picnic there one night. I know what a railroad lantern is. I never saw one there. By Chinese lanterns I mean one of those colored paper affairs with a candle in it. I saw them there one night, on the part towards the water. I could not tell how many. I saw one benzine torch burning on the pavilion alongside the lunch counter, one summer evening, before the fire in 1879. That is the only time I ever noticed one there; that is the only place I ever noticed one there. I did not testify anything about that on the former trial.

SMITH D. LANGDON testified:

In August, 1879, I was in the employ of the Remsen Express Company. The route of that company was Bath and Coney
64 Island. I remember on the 13th of August, 1879, taking from Mr. Wilkin's store the packages he has spoken of. They were a barrel and a half barrel. The barrel was marked blue; it was marked 150 kerosene. The half barrel had no mark on it, to my recollection. The color of that was the same as the large barrel, I think—blue and white end. I gave those two packages to our other driver, Kimball. I delivered them here in Brooklyn. His business was to drive the other route; he drove from New York to Bath, and I drove from New York to Coney Island. I changed them from my wagon to his. As near as I can come to it now, it would be between four and six o'clock, which was the usual time of meeting. That was the ordinary course of the business. (Referring to Exhibit "A:") Those are my initials; I put them on the time I got the packages from Mr. Wilkin.

JACOB CONSTINE testified:

I am commercial traveller now; my age is twenty-seven. In August, 1879, I was employed at the Bath Park Hotel; that was kept by Whipple & Pier; that was about one mile from the Locust Grove Hotel.

Q. What do you know about the use of gasoline in that hotel?

Objected to on the part of the plaintiffs as incompetent and irrelevant. The court overruled the objection, and the counsel for the plaintiffs excepted.

A. Well, we used gasoline there in lighting the pavilion.
65 Q. Where was the receptacle of gasoline—the tank from which it came?

Objected to on the part of the plaintiffs as the witness is now speaking of another hotel. The court overruled the objection, and the plaintiffs' counsel excepted.

A. It was in the tree, about ten yards or ten feet from the pavilion. The gasoline was taken to the pavilion through regular gas-pipes. I was at the Locust Grove Hotel on the evening of the 15th August, 1879.

Q. From what place did you go?

A. I went there from the Atlantic Hotel.

Q. And from what place did you come to the Atlantic Hotel?

A. From Bath Park Hotel. A boy by the name of Jimmy Marmion was with me. I should judge I left the Bath Park Hotel about turning dusk. It is about five to seven minutes' walk from the Atlantic Hotel to Bath Park Hotel. I walked; Marmion also. We both walked from the Bath Park Hotel. It is very near a mile from the Atlantic Hotel to the Locust Grove Hotel. I took the cars and Jimmy walked. I got there first and waited for Jimmy. We carried two wooden pails; each one a pail. They were ordinary-sized wooden pails. When I got to Locust Grove Hotel I see some young man, and he direrected me to Mr. Walker. I saw Mr. Walker; I did not see Mr. Gunther there that night. I saw Mr. Walker and spoke to him. I saw Mr. Walker's wife; spoke to her. I saw Mr. Schuschardt. He was, I judge, the man of all work around the hotel. I had seen him before once or twice around the Bath Park Hotel. I spoke to him while we were walking. Schuschardt went with us to the oil-
66 room. (The witness points out on diagram where the oil-room was.) The oil-room was in the basement underneath. Schuschardt opened the door of the oil-room. It opened inside. The boy Jimmy was with us. Schuschardt went in first. He had a lantern. It was lighted. It was an ordinary stable lantern, such as are used every day—stable lantern with wire to swing it and small holes around the top, enclosed in a glass. Schuschardt placed it on the sill going in—on the door sill. There was but one step down going in. The oil-room, I should judge, was twelve feet going around—twelve feet square and twelve feet to the ceiling. There were in the oil-room barrels, paint pots, broken chimneys, general rubbish. I only saw one barrel. When we got in we started to get oil.

Q. What did you say to Schuschardt?

The counsel for the plaintiffs objected as incompetent and irrelevant. The court overruled the objection, and the counsel for the plaintiffs excepted.

A. I told him that I wanted the five gallons of oil that was borrowed.

Q. What did Walker say to Schuschardt?

Objected to on the part of the plaintiffs as incompetent and irrelevant. The court overruled the objection, and the counsel for the plaintiffs excepted.

A. He told him to let us have the oil; to go down-stairs with us. Walker was then in the pavilion. Schuschardt went to get his light; started pouring out the oil in one of the pails. He drew it from the barrel through a piece of gas-pipe used as a faucet. Schuschardt started drawing in one of the pails, and after we
67 had one of the pails full we found it leaked and we poured it into another pail; and then I found that one of the pails wouldn't hold five gallons of oil, and then he remarked he had one he thought would hold five gallons; and he got the can—a square can—and put in the spigot, as I call it, and it began to get dark and he moved the lamp over nearer the oil. I told him to be careful, and he told me to mind my own business, and he put the lamp over nearer the barrel of oil. There was some conversation about a girl he was going to see, and the oil was leaking through the can, and the first thing I knew there was a sort of thundering noise and a blue flame was shooting through the room, and in an instant the whole place was an entire mass of flame. Of course there was great excitement, and Schuschardt got out first. I helped Jimmy out, and some one hollered, "Go for the grass." I paid no attention to that and ran for the river and jumped overboard. The river, I should judge, was 100 feet. (The witness indicates by a diagram.) I ran down to the dock. The lamp was very close to the barrel when I heard the noise and saw the fire. (The witness indicates by the diagram where the lamp was and the distance from the barrel, and says it was about eighteen inches.)

Q. And in the same condition that it was when you saw Schuschardt put it on the sill?

A. Yes, sir; lit.

Q. Lit and enclosed in a glass?

A. Oh, yes, sir; of course. I was burned very severely; so bad that I was abed for thirteen weeks. I saw Schuschardt go out of the oil-room. I never saw him after that. Schuschardt went
68 out before me. I helped Marmion out.

Q. Now, I will ask you what was it that you went to the Locust Grove Hotel to borrow again.

The plaintiffs objected. The objection overruled on condition that it be connected with the statement of Mr. Walker. The counsel for the plaintiffs excepted.

Q. Were you or not out of gasoline at the Bath Park Hotel when you went to the Locust Grove Hotel?

The counsel for the plaintiffs objected. The court overruled the objection, and the plaintiffs excepted.

A. Yes, sir; we were out of it.

Q. And what did you go to Locust Grove Hotel to borrow?

The COURT: I understand this testimony is coming in subject to be stricken out unless you connect it with Mr. Walker.

A. I went to get gasoline.

Q. Did you tell Mr. Walker so when you went there?

The counsel for the plaintiffs objected. The court overruled the objection, and the plaintiffs excepted.

A. I told him we wanted the oil that was borrowed some time ago from the hotel, and we wanted it because we were out.

Q. Just repeat again what you said to Walker.

A. I told him that we wanted the oil that they borrowed from us some time ago. He said to that, "All right;" to call Schuschardt, and it was on that Schuschardt went in with me. We came to go first to Atlantic Hotel, because we were sent there.

Q. Did they use gasoline there?

69 The counsel for the plaintiffs objected. The court overruled the objection, and the plaintiffs excepted.

A. Yes, sir. We didn't get it there, because they were out of it. After that we went to the Locust Grove Hotel. I was not on the pavilion in the summer of 1879, before that evening. I passed it. I saw they had colored lights along the top of the pavilion. I don't know whether they were lanterns or colored lights.

Q. Did you see any torches there?

A. I don't recollect, I am sure.

Q. You don't recollect about that?

A. Well, I hardly recollect; no, sir.

On cross-examination witness testified:

At the time of the fire I was eighteen years old, going on nineteen years. I have been examined as a witness on every trial of this action. I don't know whether it is three or four or five times. I went to Furnell's first. I testified before that. I was told to go to Furnell's first and then go to Locust Grove. I don't remember on what trial. I don't remember that I did on the first trial. I do not know that Furnell's borrowed any oil; we were sent there. I am certain that this oil was taken from a barrel that was painted white and a gas-pipe in it; the head was painted white. I am very positive of that. I know the color when I see it, I guess; the sides of the barrel was blue, white head, and a gas-pipe in it. It leaked; it was not
70 leaking when we went in, because there was a plug in it, and when we went to draw the oil out of it of course he tipped it up. It was not a full barrel. That is the only one I saw. I should judge we were there from seven to ten minutes. The first thing we did there was to start to fill oil out of that barrel. The pail leaked. We filled the first pail. We didn't discover it leaked until we had filled the first one. It leaked and went on the floor.

Q. How may quarts—three quarts?

A. I couldn't say how many quarts. I think the other pail was all right. We started to fill the other pail. The one that leaked we filled first. We filled the other pail out of the one that leaked. The conversation we had with Schuschardt about the girl took place when we were filling the can. He got telling me about some girl in New Utrecht he was going to bring to our pavillion to dance, and of course I was fooling him about it; that is about all the conversation. He was in a very friendly mood.

Q. When did you say you were taken sick about thirteen weeks; when was that?

A. I wasn't taken sick; I was burned at the fire; I was in bed two or three days; got up and went to bed again. My business now is commercial drummer; my old business. I hail from Harlem, E. 109th street, New York. Before that I was jack of all trades. I did general work at Furnell's. It was a long time after that when I next went to work. I could not remember when it was; quite some time. I don't remember the position I had. I had quit some and made changes for the better. I could not say whereabouts. I don't remember when I did next go to work. I don't remember my positions as distinctly as that. I never paid much attention to
71 them. When I left them that was all there was to it. I don't remember the name. Sometimes I was with a person a year, sometimes two years, and maybe less. The fire took place in August, 1879. I don't remember what was my first business after that. I do not know the person's name.

Q. Do you know where it was?

A. No, sir; I don't remember whether I had a position for four months or a year.

Q. Now, after that you went to some one; you don't know who it was or where it was. Whom did you go with next or what did you do?

A. I don't remember. I have no idea of the persons' names.

Q. Do you know the nature of the business?

A. Jack of all trades, as I said before—that is, to do anything I was asked to do. The people I worked for, I don't know their names. I don't remember what I did next after that. I don't remember where I was. I don't remember what position I had. I do not know the kind of business. I don't know the person's name. I do not know any persons who were employed with me. I may know them and forgot them. The next time the position I had—I don't remember whether it was the next one or the one between that—I was in the wholesale clothing business. That was 649 Broadway, with Seligman & Co. I was there two or three years. I am at present a commercial drummer for myself. I commenced this commercial drummer business for myself two years ago. I drummed then for L. Morrison. He did business at 54 Lispenard street, New York. He has moved since then, and he is out of business. I drummed a little over a year, and ever since then I have drummed for myself. The business was in lace goods,
72 ladies' fancy goods, neckwear, handkerchiefs, and so on. I bought and sold them. I call that drumming. I bought them at different houses.

Q. Give us the names of some of the houses.

A. I don't think that is necessary.

The COURT: You had better answer the question.

WITNESS: I buy of different houses. I buy them as I need them. I don't really remember what houses I buy them of. I buy them where I get them the cheapest. I am in that business up to the present time.

Q. Where did you buy last?

A. I haven't bought any last. I just started in after the holidays. I am selling samples. I commenced about a year ago. The kind of business I commenced in was selling everything. I am not in the insurance business. I bought some goods from the Lovell Manufacturing Co. They did business in Greenwich avenue, New York. I don't know the number of the street. It is near Twelfth street. That was before the holidays—the last holidays. I bought clocks and rugs.

Q. How much did they amount to?

A. Some of the clocks $13, and some of the rugs $6 and $7. The name of the gentleman at the head of the house is Hulschapple. That is the only concern I bought of lately. I have not bought anything since the holidays.

Q. Now, just before the holidays of whom did you buy?

A. I wasn't doing anything before the holidays. I was not drumming at all then. I don't remember how many months before that; maybe two or three months.

73 Q. Whom did you buy of?

A. I done such a poor business I hardly bought anything at all. I paid my own expenses, and that was all. I can't remember a single person of whom I bought of before that. The barrel that we drew this oil from had a white head and painted blue on the sides and had a gas-pipe in for a faucet. The gas-pipe was about six inches long. It had a piece of wood at the end of it. It didn't leak when it was stopped up; it leaked around it. It was filled in with wood to keep it in place, to tighten it.

Q. In other words, the hole was larger than the gas-pipe?

A. Larger than the gas-pipe; yes, sir. The barrel was lying on the side, on stanchions. They were common lumber; they were not a common barrel cut in two. I took particular notice of it, because a barrel was not long enough. I did not move it at all; Schuschardt did. He tipped the barrel up on the top so the oil would run out the faster, and held it that way, and then afterwards he held the can; also held the can with the other hand. He did not stop pouring. He kept pouring when he was talking about the girl. He was pouring from seven to ten minutes. I stated that we might have been in there from ten to twelve minutes. He was in a stooping position. This barrel was from six to seven feet from the door. I have been examined on all three trials.

Q. Do you recollect at the last trial this question being put to you? "Q. And Schuschardt was pouring from one pail into the other?" to which you replied, "Yes, sir."

A. Yes; that is true. It was true then and is true now.

Q. Then this question was put to you: "Who did the act
74 of pouring? A. I poured it. No—well, I don't really remember whether I poured it or Schuschardt."

A. That is right; yes, sir.

Q. So you don't know now whether you poured out the oil or Schuschardt?

A. Well, it was poured out by one of the two.

The COURT: He didn't say that "that pouring" means pouring from one pail to the other.

Q. So you don't know now whether you poured it from one pail to another, do you?

The counsel for the defendant objected. The court sustained the objection, and plaintiffs' counsel excepted.

The plaintiffs' counsel then read the question put to this witness on the former trial and his answer:

"Q. Who did the act of pouring?

"A. I poured it. No—well, I don't really remember whether I poured it or Schuschardt."

Is that your testimony on the former trial?

A. Yes, sir; that is my testimony. I meant pouring from one pail to another. I am not quite certain whether I did or not.

Q. Did you see fumes arising as you poured it out?

A. The only fumes that I saw arising was from the pail that was filled near the door.

Q. And you saw the fumes arising?

A. Yes, sir. I was examined as a witness on the coroner's inquest. Mr. Cropsey was the coroner. I recollect testifying on the coroner's inquest: "I only noticed one barrel. There was a blue barrel, white top; no other barrel there." I might have testified to the coroner, but I don't remember it, that "I asked Schuschardt on the way to the room for gasoline; told him I wanted five
75 gallons of gasoline; gave me no answer, but when we went in he began to pour the oil from this five-gallon tin can into the pail." I testified before the coroner a few days after the fire; it was a very short time after. That is as near as I can state. It may have been ten days, but I cannot remember the time, because I was not in a condition to remember anything. I was not in such a condition that I could not tell the truth.

Q. Will you swear that you did not testify before Mr. Cropsey on that inquest that the oil was poured from this five-gallon tin can?

A. I could not swear to anything I said then, because I was not in a condition to testify. I testified against my own free will. I had to be carried there in a carriage and back. I don't remember who carried me there; it was somebody; who it was I do not know. I don't remember if I was there one or three days. I know I was at the coroner's jury.

Q. Didn't you testify before the coroner that you applied to Mr. Walker for a loan of five gallons of oil?

A. Oh, I might have said a loan; yes, sir; I might have said that.

Q. Well, didn't you say it?

A. I don't remember. I was in good health at the last trial.

Q. Didn't you testify in the Queen's case? "Was not the room about twelve feet square?" to which you answered, "I couldn't place it by measurement." You recollect testifying to that?

A. Yes, sir.

— And this? "Q. You went there to borrow oil?" to which you answered, "Yes, sir."

A. That is right; yes; that is true now.

76 Q. Now, this testimony took place in March, 1881: "What occurred when you got down there? A. When we went down there he asked us what we wanted, whether we wanted oil or gasoline." Do you recollect swearing to that?

A. I don't recollect; no, sir.

Q. I ask you whether you recollect testifying in the case I refer to and *to* this answer to the question: "When we got there he asked us what we wanted—whether we wanted oil or gasoline."

A. Well, I guess he did ask us; yes, sir; that is true.

Q. They had one barrel. Now, did you expect him to draw kerosene and gasoline out of the same barrel?

A. I told him what we wanted when we got into the room. (The question being repeated, he answered:) I didn't know there was but one barrel when he asked me that, because we were on the way when he asked that. I didn't know whether there was one barrel or fifty. I have not talked to the agents of these insurance companies and the counsel. I went to the Bath Park Hotel some six weeks before the fire. They burnt there kerosene and gasoline—gasoline on the pavilion. (The witness was shown his deposition at the coroner's inquest and said that the signature was in his handwriting.) I don't remember whether it was read over to me. I won't say that it was and I won't say that it was not.

On his redirect examination the witness testified:

There were four victims of the fire, and the coroner's inquest was held over the whole of them. There was immediately after the fire a great excitement over it.

77 Q. When you say you were in the oil-room ten or fifteen minutes or swear to ten minutes you do not mean to be precise as to the actual time you were in there?

A. I want to be as exact as possible. I say that the barrel out of which the fluid was drawn by Schuschardt was one that had an iron pipe in it as a faucet. I should judge the size of it to be a three-quarter barrel. It was not a full barrel as to size. I worked in the Bath Park Hotel—first in the dining-room, then around the bar, and after that I had to do with the lighting. They used both kerosene and gasoline there.

Q. Now, was the gasoline used anywhere except in the tank in the tree?

Objected to on the part of the plaintiffs as irrelevant and incompetent. The court overruled the objection, and the plaintiffs' counsel excepted.

A. I believe there were several lamps in the bar that used gasoline. They were made in the style of a torch, except having a bulb on the top like that (pointing to a torch in the court-room), made like a street lamp; had a curl around the top where the oil was run into.

Q. When you say oil you mean gasoline?

Objected to on the part of the plaintiffs as irrelevant and incompetent. The court overruled the objection, and the counsel for the plaintiffs excepted.

A. Gasoline; yes, sir.
Q. And when you say oil in connection with that apparatus?

78 Objected to on the part of the plaintiffs as irrelevant and incompetent. The court overruled the objection, and the plaintiffs' counsel excepted.

A. Gasoline; yes, sir; I call it oil. I got quite a knowledge of the difference between gasoline and kerosene in my handling of them. I performed the act of pouring the gasoline into the tank in the tree with a pail.
Q. And how large a quantity would that tank hold?

Objected to on the part of the plaintiffs as irrelevant and incompetent. The court overruled the objection, and the counsel for the plaintiffs excepted.

A. Well, I judge twelve or fifteen gallons; maybe more.
Q. What was burned at the other end where it came through the pipe was the vapor, wasn't it?

Objected to on the part of the plaintiffs as irrelevant and incompetent. The court overruled the objection, and the plaintiffs' counsel excepted.

A. The vapor, sir; there was no wick. The kerosene lamps were filled in the ordinary way, with a wick.
Q. And the gasoline burned by the vapor coming out?
A. Yes, sir; I did not become familiar with the difference in the flame of kerosene and gasoline. I became familiar with the appearance of it.
Q. You say that this pail in the oil-room gave off fumes; what were those fumes?
A. A sort of vapor arising from it, and when the fire flashed the color was blue. I know the difference between the smell of kerosene and gasoline.

Q. Did you notice at the time in the oil-room when this
79 combustion and explosion took place a smell?
A. I didn't take particular notice of the smell.

The counsel for the defendant read the testimony of this witness, Jacob Constine, given on the coroner's inquest.

JACOB CONSTINE, being duly sworn and examined, testifies:

I reside — No. 816 East 3rd street, N. Y. On August 15th, 1879, was working at Bath park, about half a mile from Locust Grove. My business at Bath park was to trim and take care of the lamps, light up the lamps around the bar and on the park grounds. Mr. Whipple keeps the Bath park and used gasoline on the pavilion and out-

side, on the grounds, and around the bar kerosene lamps. I had charge of the gasoline works at Bath park during the same week that Locust Grove burned down; on the 13th of August told Mr. Whipple that gasoline was out; on the 15th August, 1879, had no oil. In the evening or towards evening Henry, the cashier, told me to go with Jimmy to Mr. Furnell's for the loan of some gasoline. We went to Furnell's. He said he was out of oil and could not lend me any. Jimmy says, "We may as well go to Walker's and get the oil;" so we went. Mr. Whipple did not send us at all. Well, we went down to Locust Grove. I waited for Jimmy. I got there ahead of him. I rode and he walked. We saw Walker, sort of a stout man; never saw him before. I asked him for the loan of five gallons of oil for Mr. Whipple. I only asked him for five gallons of oil; did not mention any particular name of oil to Mr. Walker; never saw Hennessy at all.

80 Mr. Walker told me I could have it for Mr. Whipple with the greatest pleasure. Then William Schuschardt passed by and Mr. Walker told him we wanted the oil and he should give it to us. That is all Walker said. Then Schuschardt came with a lamp, a closed lantern. Walker told him not to take that in the room, and if he did to be very careful. Schuschardt went with us to the oil-room, all three—Schuschardt, Jimmy, and I. Jimmy and I each carried a pail. The pails were ordinary common yellow-pine water pails, all open at the top, and no covering for them at all. Schuschardt took the lantern in his hand inside and placed it near the barrel. I took it away and placed it at the door sill; the door was open; then he, Schuschardt, brought it back. I only noticed one barrel; there was a blue barrel, white top; no other barrel there at all. He, Schuschardt, placed the lamp very near the barrel; began to draw oil from a five-gallon can. I asked Schuschardt on the way to the room for gasoline; told him I wanted five gallons of gasoline; gave me no answer, but when he went in he began to pour the oil from this five-gallon tin can into my pails; that pail of mine leaked; then Schuschardt poured it from the leaky pail to the other pail I had. In so pouring the oil he spilled a great deal of the oil on the floor. This second pail leaked. He had the lamp about five feet from the pail when it began to leak. My pail—the first one—leaked out of the side and also out of the bottom, only in two places; that is all I saw. After the pails leaked so and the spilling of the oil, then Schuschardt drew oil from this barrel. I noticed no name of oil on that side of the barrel; had a piece of gas-pipe in the head of the barrel near the bilge.

81 The barrel was at first standing upright; then when Schuschardt wanted to draw the oil he pulled the barrel over. He had to bear down on it to get it out; was not much in it. In attempting to draw the oil from this barrel a great deal was spilled on the floor. About as much oil went on the floor as went in the can. I did not draw any oil myself, nor did I attempt to draw any. While Schuschardt stood by the barrel drawing this oil I stood opposite Schuschardt. Jimmy stood nearer to the door. The first thing I noticed was a rush of light over the floor; licked the floor right just the same as if you were sweeping; was a sort of bluish light. I

jumped to get out of the way as soon as I could. I was on fire, my pants and on my back. I ran out of the room and into the water about forty feet from where I was with the oil. I did not see anything of William Schuschardt after I ran out of the room. I was badly burned and remained in the water until the fire was out. As near as I can say, about three and one-half gallons of oil were drawn altogether. There must have been about a quarter of a gallon spilled from the pail to the floor, and there was spilled altogether about three quarts. When I went in the room I noticed a sort of thick coating on the floor; seemed like dirt and paints and oil together. I did not notice any fresh-spilled oil. I had never been in that oil-room before and I haven't been to the grounds since the fire. I saw Jimmy run out; he run away. I ran out all alone. I have smelt gasoline at Bath park before this fire. I noticed the smell of this oil I was getting from Schuschardt, and it had a peculiar smell.

82 It smelled more like gasoline than kerosene. I had smelt benzine; this did not smell like benzine. When I first noticed the fire I noticed it came from toward the barrel to the direction of the lamp. I am sure there was no oil around that lamp; the fire originated by the barrel and pails and went to the lamp. There was no other light in that room. The one we had I am sure was—I am positive the lamp was—a tight-closed lantern. We had no way of measuring the oil. I said we had five gallons. Schuschardt was very stubborn and said it made no difference if he gave us five or seven gallons. I told him I thought we had five gallons poured out. I don't know whether Schuschardt knew what I meant when I mentioned gasoline; he acted in a very strange way towards us; he seemed not to care about getting the oil for us. This barrel was narrower than a kerosene barrel. I have seen a great many kerosene barrels; should reckon this barrel was about 35 gallons.

JACOB CONSTINE.

A. G. C. J., *Coroner.*

JACOB CONSTINE recalled:

I noticed only this one barrel of oil in the room. I also noticed some paint cans under the table; took no particular notice of anything else than the oil.

JACOB CONSTINE.

A. G. C. J., *Coroner.*

The witness then continued his redirect examination:

83 I said on my cross-examination that I knew nothing about the borrowing of gasoline by the Locust Grove people and the Bath Park people. I was asked on my cross-examination who the person at the Bath Park Hotel was who gave me directions to go to Furnell's—the Atlantic Hotel; it was Henry the book-keeper. I don't know his last name. I remember Schwencke who was my helper, or I was his helper, rather.

Q. Wasn't that the man? Haven't you them mixed?

A. I think I have. When I stated Shelley I meant Schwencke. He was a witness on the former trial. He had charge of the gasoline tank in the tree part of the time. The gasoline was kept under the shed, a sort of horse-shed in the round. Not Schwencke but Henry, the book-keeper, gave me directions to go to the Atlantic Hotel. When I said before the coroner's inquest that I told Whipple that the gasoline was out I don't remember to whom he referred me; I think it was Mr. Pier. He was the other partner of the Bath Park House. I went over to Henry and told him there was no oil.

Q. When you say oil you mean gasoline?

A. Gasoline; that we couldn't light up; and it was on that I went to the Atlantic Hotel, and when I got to the Atlantic Hotel and found I could not get it there I went to the Locust Grove Hotel.

Q. Did you or not go for anything except gasoline?

The plaintiffs objected. The court overruled the objection, and the plaintiffs excepted.

Q. Was that what you went for?

A. We went for gasoline.

Q. Now, you have been asked a good many questions about your employment; who have you lived with since the fire?

A. With my father and mother, No. 210 East 109th street,
84 New York city.

JAMES MARMION testified:

I live in Utica, in this State. I am now in the grocery business; before that I was with Senator Francis Kernan—not in his law office, but in his house. Before that I was employed in Litchfield Springs. In the summer of 1879 I was employed at the Bath Park Hotel, the same hotel referred to by the witness Constine. Mr. Whipple was proprietor. I done the errands and the marketing. I went there that year—that summer it was first opened—and was there down to the fire at Locust Grove. I had nothing to do with the gasoline apparatus. In the evening of the 15th of August, 1879, I went with Constine from the Bath Park Hotel. I started out at the request of Henry, the book-keeper. I do not know his last name. We carried two open pails; one Constine carried and I carried the other. We went to Furnell's; that is the Atlantic Hotel. That was about four blocks from the Bath Park Hotel—less than half a mile. I didn't know at the time I started out from the Bath Park Hotel that they were out of gasoline. I remained at the Atlantic Hotel just a few minutes; did not get anything there; then went to the Locust Grove Hotel. Constine rode and I walked. That was about half a mile. Had never been at the Locust Grove Hotel before. I think it was about seven o'clock. I do not know what kind of a day it was—whether it was rainy or not; no recollection about the weather.

I saw Mr. Walker, saw him on the pavilion. He was
85 standing talking with Constine. Constine got there ahead of me. I next saw Schuschardt. I think I had seen him before at the Bath Park Hotel; I could not exactly say how long

before. We, Schuschardt, Constine, — myself, went down under the pavilion in the oil-room. Schuschardt carried a lantern.

Q. Did he have it in his hand when you first saw him, or did he go for it?

A. I don't know when I saw him. I think he had it in his hand. It was one of those stable lamps, such as they have on the railroads, glass, and wire running around it and over the top, and a handle at the top. It was one of those ordinary lamps. I think Schuschardt put it on the window sill—the door sill. In going to the oil-room we went down one step. I don't recollect the size of the room. It was a small room. The height of the room was about six or seven feet. It was a ground floor. The door opened in. I never had been in the room before, I think. I noticed three barrels—two barrels and a half a barrel. When we got in the room Schuschardt begun pouring the oil into the open pail.

Q. Well, when you say oil you mean fluid, I suppose?

A. Fluid; yes, sir. He took it from the half barrel. He got it out the half barrel through a lead pipe. The lead pipe was put in just in place of a tap, in the ordinary place where a barrel is tapped. It did not have a faucet. I think it had a piece of wood, a plug, in the end. The fluid ran out from this half barrel. I think he had to tip it out. It ran into one of the pails. The lamp was on the door sill, I think, during this first pouring out. Schuschardt drew
86 out of the half barrel a few minutes, I think. I think he drew enough out to fill the first pail. I do not speak with accuracy about the length of time. Then Schuschart started to fill the second pail in the same way from the half barrel. He then found the pail was leaking. He said he had a five-gallon oil can that he would loan us. The first thing I noticed was a blue flame drew across the floor as if you drew a broom across it. I don't know about any noise. I think the position of the lamp had been moved. It was moved; I don't know which way. It was moved one way or the other. I don't remember whether it was before or after the discussion that the second pail leaked. I don't remember any pouring from one pail to another.

Q. How long after the second drawing, the drawing into the second pail, before the fire broke out?

A. It was only a few minutes. I did not time these things.

Q. Was there any interval of time between the pouring into the first pail and then drawing in the second pail, except the time it would take to do these things?

A. No, sir. I did not stop to talk. There was some talking going on.

Q. What I want you to tell the jury is whether or not from the time you went into the oil-room the things that were done as you have described, the drawing into the first pail and then into the second pail, and then the fire, all happened within the time it took to do these things.

A. Yes, sir. The oil-room was all on fire, full of blaze of flame. It was right away after what I have described. I got right
87 out. I was on fire; my body was on fire; my clothes; my

hat was on, that was not on fire. I ran out, tried to get out, and Constine shoved me and Schuschardt pulled me, and I fell between the two barrels, and then I made for the door, and I heard the guests hollowing "roll on the grass," and I done so and put out the fire. I think the grass was in front of the pavilion. I wasn't burned very bad. All I heard Mr. Walker to say to Schuschardt was to be careful. That was before we went into the room and while Schuschardt had the lamp in his hand. I don't remember anything else that was said. The last time I saw Schuschardt was at the time of the fire. I did not see him afterwards. I saw his dead body afterward. This half barrel I have spoken of I did not notice at the time what its color was, sides or ends. I don't know in reference to the other barrels, or whether it was nearer the door or further inside or whether it was between the two barrels. I don't remember whether it had any name on the end. I think it rested on stanchions. I do not know and cannot say while I was in the oil-room that the flame of the lamp came in contact with the fluid. I think the nearest the lamp was at any time towards the barrels was between four and six feet. I didn't touch the lamp. There was nothing said between me and Schuschardt in the oil-room.

Q. In reference to the thing that was being drawn?

A. No, sir.

On cross-examination the witness testified:

I went to Bath Park Hotel, I think, in the spring, when
88 it was first opened. I think I was about fifteen years old then. I am now going on twenty-three; I was twenty-two last May. I remained at the Bath Park Hotel till it was closed. After that I went to Brooklyn. I was waiter there, I think, about a year or two. After that I went to Lichfield Springs and was waiter there, and next to Francis Kernan, a lawyer. I can read and write. I could always read and write a little. Since then I have been to a business college. I have been examined on all these trials. I was examined before the coroner. I made my mark to the deposition. I don't know why I made my mark. I can't tell why. I can write better now. At the time I could write a little. I don't know as I could say I could write my name; I won't say that. I don't know about my writing other things except my name. I don't know as I ever wrote about other things. I don't think I ever did. I don't know that I ever wrote my name. I have since. I don't know before that time that I ever wrote my name. I have a pretty good memory. I am certain the barrel the oil was taken from had a pipe in. I think it was a lead pipe. It was the natural color of lead. I don't know that it was a piece of gas-pipe. It was plugged up. It was a wooden plug. I don't know that little pieces were put around the pipe to make it fit. I don't know that I took any notice of it. The pipe in length was four to six inches. There was a half barrel there. I know the difference between a half barrel and a barrel. There is a very decided difference be-

tween them and very perceptible to the eye. I don't know,
89 I don't remember exactly, how long since when I first recollect that was a half barrel. It has been some time. I was examined at the last trial.

Q. Was this question put to you and you made this answer: "How long is it that you have known the fact that there was a barrel and a half barrel in the room that night? A. I could not state the time." Is that so?

A. I don't remember. I have a good memory.

Q. Do you recollect your testifying to this on the coroner's inquest: "When I went into this room I noticed two barrels. I can't say that I noticed any particular difference in their size; paid no attention to that. They were both blue. Noticed nothing particular as to smell?"

A. I don't remember anything about the coroner's inquest. If I testified so, it must have been true.

Q. Do you recollect this question being put to you at the last trial, only a year ago: "Was your recollection of what the facts were at this time, at the time of the coroner's inquest, as good as it is now?" to which you answered: "No, I don't think they were as good then as it is now." Do you recollect that question and answer?

A. Yes, sir; that is so, and it is true.

Q. Recollect this question: "Your memory improves with age, don't it? A. I think so; yes, sir." That is so, isn't it?

A. Yes, sir.

Q. And that is true?

A. Yes, sir.

Q. That is so, isn't it?

A. Yes, sir; I think it is.

90 Q. And the same question was put to you at the last trial, to wit: "The longer between the interval and time of testifying the more accurate you remember? A. I think so; yes, sir." Do you remember that being put to you?

A. Well, I don't know as I do, sir.

Q. But the fact you recollect that your memory improves with age?

A. Yes, sir.

Q. I put this question—was this question put to you: "'So that in five or six years from now you will have a very accurate recollection of what occurred? A. Yes, sir." Do you recollect that question being put to you and answered?

A. No, sir; I do not.

Q. Is that the fact?

A. Well, I don't remember that question.

Q. Yes; but as to the fact. I will put that question to you, independent now of the testimony, so that in five or six years from now you will have a very accurate recollection of what occurred?

A. I don't remember that, sir.

Q. How is it independent of that question?

A. I don't know; I don't remember it.

Q. Now, you have said your recollection improves by age?
A. Yes, sir.
Q. Then in five or six years from now you will have a more accurate recollection of what occurred, won't you?
A. I don't know about that.
Q. Now, I ask you whether this question was not put to you: "So that in five or six years from now you will have a very accurate recollection of what occurred? A. Yes, sir."

Objected to as asked two or three times. Objection sus-
91 tained and exception.

The COURT: He has said two or three times he doesn't remember.

Q. This question was put to you: "When did you first begin to notice this improvement in your memory as time elapsed? A. I couldn't say that, sir." Do you recollect that question being put to you?
A. No, sir.
Q. Well, can you tell us now when you first noticed that improvement in your memory?
A. I notice it now, sir.
Q. When was the first time that you noticed that your memory improved with age?
A. I couldn't say, sir.
Q. Was it a year ago?
A. It may be more and may be less.
Q. But the fact it does improve by age?
A. Yes, sir.
Q. And you can't tell whether you noticed that two years ago or one year ago?
A. No, sir; I can't say.
Q. Was it three years ago you noticed it?
A. I can't tell, sir.
Q. But you did notice it?
A. Yes; I notice it now—yes, sir.
Q. Didn't you swear on the coroner's inquest that you saw no keg there?
A. I don't know what I did swear there. I don't remember what I did swear there. My memory has improved, still improving, and as time elapses these things become more vivid to my recollection. I think I did hear Walker tell Schuschardt not to take a light in that room, or to be careful.

Q. Well, didn't you testify at the coroner's inquest that
92 you heard Walker tell Schuschardt not to take a light into that room?
A. I don't remember.

(The witness was shown his mark to the deposition taken before the coroner and was asked if he remembered it. He said he did not remember it.)

I am the person that Constine calls Jimmy. I heard his testimony to-day. I heard all his testimony. I heard his deposition at the coroner's inquest read, and my recollection accords with that.

On his redirect examination the witness testified:

The coroner I spoke of is Mr. Cropsey, who is here personally acting for the plaintiff. The inquest was held at the town hall, New Utrecht, in the presence of the four dead bodies. When I say I don't recollect about making my mark I do not recollect particularly any circumstance about the coroner's inquest. I do not know how the testimony was taken down. Since that time I have learned to read and write better. I have attended evening school, and made progress in my knowledge in that way.

Q. And when you say that you think that your memory is improved by age do you or not mean that you think you have made progress in your faculties generally?

Plaintiffs objected. The court overruled the objection, and the plaintiffs excepted.

A. That is what I mean.

93 THOMAS SHELLEY, whose testimony was read from a former trial:

I was employed in the Locust Grove Hotel in the summer of 1879 as a generally useful man. I recollect two barrels coming to the hotel two days before the fire—the 13th August, 1879—brought by the expressman. He deposited them between the office door and hotel entrance. I might have seen them there, but I didn't roll them in until the next day, the 14th, when we tapped them. We tapped the small one first. One of them looked like a kerosene barrel—the big one—and the other one was kind of a half barrel. I rolled them from the front of the building down to the oil-room underneath the pavilion. I did not roll them through the house, but around the side of the house. I placed the big barrel on the right-hand side as you go in, and the small barrel a little further inside. They must have been ten or eleven feet from the door; somewhere about that. Mr. Walker had to tap them. Another gentleman was in there; I couldn't say who it was.

Q. You made a hole in them?

A. Yes, sir; in the end of the small one I put in the hole what looked to me like a piece of gas-pipe—that color—but I suppose it must have been brass. I helped to put it in.

Q. Who did the work besides you?

A. Mr. Walker and another man. I rolled in those barrels about seven or eight o'clock in the morning. No one helped me; it was falling ground. I left those barrels there in the oil-room, and did not go in again before the fire. Mr. Hennessy gave me directions about it. I think there were two or three steps down to the oil-room. I was not there during the fire.

94 On his cross-examination he testified:

The color of the half barrel was white ends; the staves were blue—kind of blue it looked to me. The one I tapped had a white head; both of them had white heads. I cannot swear there was anything except the white color.

Q. Cannot you say whether there was lettering on it?

A. It was marked benzine. I can swear to that positively. I said on a former trial I put pipe in there—gas-pipe the color of that.

Q. You weren't always in a condition to remember what was going on there at that time, were you?

A. Yes, sir; pretty near. I was intoxicated there once or twice—not daily.

FRANK R. AZOY testified:

I live in Springfield, Massachusetts. I am in the horse business there. I was on a visit to the Locust Grove Hotel in August, 1879. I knew Mr. and Mrs. Walker and young Ham, who was a son of Mrs. Walker by a former husband. I was there two weeks before the fire and remained until the hotel was burned down. I had no other business there than a friendly visit. I was frequently on the pavilion—in fact almost every night. I recollect the oil-room. I can hardly remember when I first went into the oil-room, it is so long ago. I recollect going once or twice—once certainly. I should imagine I was in there a day or two before the fire. The fire was on the 15th August, 1879, and to the best of my recollection I think it was either one or two days before. The door was
95 open. I went in by my own accord. I had a spot on my clothes which I wanted to remove and I went in there for some fluid to remove it with. Nobody was in the oil-room. I got the fluid from what apparently seemed to be a half barrel. I removed the plug from what seemed to be, in fact was, a gas-pipe apparently. The barrel rested on sort of skids, as it was, and the lower end next to the chimes the gas-pipe projected from it, and the plug was in that.

Q. Describe the fluid that you took out of the barrel in the oil-room.

A. The fluid was rather light blue; had a smell of gasoline. I applied it to the grease spot on my pants with a rag, and the effect was I removed it entirely. There was a smell about it.

Q. Did it smell like anything you are acquainted with in ordinary use?

A. Yes, sir; it did. I should imagine I was there from three to five minutes. I had no errand or business there except what I have mentioned. I did not notice particularly about any of the contents of the oil-room. If I remember correctly, there was a barrel at the left-hand corner standing on its head. There were pillars running on each side of the pavilion. There were lamps and torches. The torches were a round metal with a long pipe projecting down—I should say two feet—with a crook, and at the end of that a mechanical contrivance which they call a spout, where the gas generates and

by igniting it you produce a flame. There is a little cup there at the end into which the fluid falls down and the lighting of which sets it on fire and makes a jet of flame. This is fed from the
96 receptacle at the top which I have described. I do not know that any wicks were used. I should say that there were at least half a dozen of those torches used there in the summer of 1879.

Q. I want to know whereabouts on the pavilion they were placed.

A. They were placed in this position as exactly as I can remember. There was the one at the further end; then they went down diagonally. I have seen Schuschardt lighting those torches and fill the cups too full, and when he ignited them it would fall down on the floor. The torches were on the pavilion every night while I was there, and continued up to the night the hotel was burned down. I was in the hotel when it burned down—just coming out of the dining-room. It was just dusk—just at sunset. I ran to Mrs. Walker's room. Miss Bleecker was in the room with her. I saw Schuschardt filling those torches once or twice on the pavilion through a can; just unscrewed the top of the reservoir or receptacle of the fluid; with a small can; stepped on the ladder, and poured the fluid into the receptacle.

Q. Do you know what the fluid was?

The COURT: Answer that yes or no, if you know, of your own knowledge.

A. Yes, sir.

Q. State to the jury what is was.

A. The fluid was gasoline.

On his cross-examination he testified:

I am in the horse business. I train horses. I have been a witness on every trial. I was a witness in the case of Gunther *vs.* The Queen's Insurance Co.

97 Q. I will read now the question and answer put to you on the trial of the Queen's case: "Q. What is the last time you were there (the oil-room) before the fire? A. On the 13th."

A. I cannot remember what I said. If I so swore I believe it must be correct. I think I testified on that trial that in the oil-room there was what seemed to be an old carpenter's bench and several torches on the floor. I also testified, I remember distinctly, that I saw the torches were filled out of a little can that Schuschardt carried around with him. I recollect testifying on that trial that I had occasion to go in the oil-room to use the fluid to clean my clothes, and that was on the 13th. I recollect swearing on the same occasion that how I came to go in the oil-room was because I knew benzine was kept there, and I got it from this small can. I also testified on that trial that I could fix the date, because on that night I was going to Coney Island with young Mr. Ham and saw the illumination at Brighton Beach.

Q. Do you remember on the same trial and on the same occasion referred to this question was put to you and you made the answer

as follows? "Q. Ever used naphtha for removing grease spots from clothes? A. No; not to my knowledge, nor gasoline or kerosene; never tried it." Do you remember that question being put to you and the answer made?

A. No.

Q. Is it true in point of fact?

A. I do not recollect the question being put to me on the former trial. I think they will, in so far as I know.

98 LILLIAN L. EVANS testified:

Before my marriage my surname was Bleecker. In the summer of 1879 I was at Locust Grove Hotel, an inmate of Mrs. Walker's family. I went there 20th of May. It was before the hotel was opened for visitors. I recollect the oil-room in the hotel. I first saw it soon after we went to the hotel. I did not take particular notice of it. It was a small place and insignificant at the time; it was on a level with the ground. I was there on the day of the fire or the day before. It was in the morning, after breakfast. I took some shoes to be repaired to Schuschardt, who had charge of the oil-room. He was a cobbler. The shoes were a pair of mine and a pair of Katie's, Mrs. Walker's eldest daughter. I had no other business there. I saw in the oil-room some barrels of oil. There were two ordinary oil barrels, blue sides, with white heads. One was a little larger than the other, the larger one toward the door, and they were standing side by side. One was stencilled and the other was pencilled in black, both on white heads.

Q. What was marked on the smaller barrel?

A. The word "benzine" straight across the head of the barrel, with a dash before and after. Schuschardt was in the oil-room filling a lamp. I dropped the shoes and went away.

Q. During the summer, and, if so, at what time, — you saw any lighting of the pavilion by torches.

A. Very frequently; the pavilion was lighted with torches when it was lighted at all. They were a sort of torch, such as is used on the stands in the streets; sort of inverted basin, which was a tank with a pipe coming from the under part and a smaller one at
99 right angles at the bottom, two little stop-cocks, one half way down the long pipe, and the other at the extreme end *and* of the smaller one. I have seen the process of lighting. When lighted it produces a brilliant flame.

Q. How was it lighted, supposing it to be filled with fluid; how was the torch used?

A. The stop-cocks were turned on and then the torch applied.

Q. The stop-cock turned on to permit the fluid to pass down from the tank and then the fluid would go where?

A. Into this little cup or receptacle.

Q. Did you see the process of lighting?

A. Yes, sir; I have.

Q. Describe to the jury how those torches were lit.

A. The stop-cocks were turned so that the fluid might pass down into the end of the pipe where the reservoir was, and then the light

was applied to that—I presume to the gas. I don't know what it was that burned, whether it was the fluid itself or the gas.

By the COURT:

Q. The light was applied over this little cup?
A. Yes, sir.

By Mr. BUTLER:

Q. What the light was applied to was the fluid that was in this little cup?
A. I don't know.
Q. It was applied to whatever was in the cup?
A. Yes, sir.
Q. What was the result?
A. A brilliant flame without any smoke.
Q. Did you notice about the dropping of the flame?
A. Yes, sir.
100 Q. State to the jury what that was.
A. When they were being lighted sometimes a bit of flame would fall.
Q. Fall where?
A. Down; and generally there were boxes of sand underneath these torches, and it would drop down into these sand boxes.
Q. Who attended to the lighting?
A. I can't say.
Q. You don't recollect?
A. No, sir.
Q. Do you recollect as to any of those torches or more being near the music stand?
A. No, sir.

On cross-examination the witness testified:

Q. In what capacity did you serve the Walkers?
A. I was companion and governess. I cannot say when I first saw the torches there.
Q. Can you come anywhere near it?
A. No, sir.
Q. Can you come within a week?
A. No, sir.
Q. Within a month?
A. I could not come within a month. I went to the oil-room to deliver two pairs of shoes to Schuschardt; did not stay there any longer than to deliver the message to him. I do not know what I said to him. I don't know what he said. I recollect testifying on the former trial: "I imagine there were about as many as ten torches; there might not have been so many."
Q. Do you recollect this question being put to you at the same trial, and your answer? "Q. Isn't all your testimony based on your fertile imagination? A. Some of it, and I have frankly confessed it."
A. Yes, sir; I did make that answer.

On redirect examination the witness testified:

101 Q. Leaving imagination aside, we will come to the fire. There was no imagination about that, was there?
A. Not at all.
Q. What was your first notice of the fire?
A. Mr. Azoy notified us.
Q. I forgot to ask you this on my direct: Where were you when the fire broke out?
A. I was in Mrs. Walker's bed-room.
Q Was that upstairs?
A. It was on the first floor.
Q. It was on the ground floor?
A. Yes, sir; over the dining-room.
Q. That is, of the hotel?
A. Yes, sir.
Q. Not the pavilion?
A. No, sir; the hotel.
Q. I want to know what time of day it was.

Objected to as wholly immaterial; objection overruled; plaintiffs except.

A. It was early in the evening, but it was dark.
Q. In the room where you and Mrs. Walker were, how was it as to your having any lights besides daylight?
A. We had a lamp lit on the mantel-piece; we were both leaning against the mantel-piece.
Q. How long had that lamp been lighted?
A. Only a few moments.
Q. Is there anything that brings the fact of your having a light to your recollection?
A. Yes, sir.
Q. State what that is.
A. Mrs. Walker had been in town shopping all day, and returned after we had finished dinner. I went down with her to din-
102 ner, and we had to have lights in the dining-room to eat dinner with.
Q. That was a late dinner?
A. Yes, sir; possibly it was seven o'clock. It was raining all day, a dull day—drizzly—and we lighted the lamp to examine some silk she had bought. We were standing by the mantel examining the silk she had bought.
Q. No imagination about that?
A. Not any.
Q. What happened to the light when Azoy came in?
A. It was extinguished by the draft.
Q. I understood you to say that when you used the number ten (referring to the torches) that you were not sure about that being correct.
A. I have tried to make it understood very distinctly that I wouldn't swear to 10 nor 50 nor 500, for I wouldn't say how many

there were at all, for I never counted them. There were more than two and possibly more than ten. I said ten; that is a fair idea.

On recross-examination the witness testified:

Q. When you said you wouldn't swear that there were more than ten or fifty or five hundred weren't you rather drawing on your imagination?

A. Rather. When I delivered the shoes I did not go into the oil-room. The barrels were on the right of the door as you enter the room, the sides of the barrels to the door, lying on the side, the heads at right angles to the door. The heads were not facing the door. The end of the barrel was not four feet from where I stood. Schuschardt was not between me and the barrel; he was squatting. I was unable to see the head of the other barrel because he
103 was in the way. Schuschardt was filling a lamp.

MICHAEL J. HENNESSEY testified:

My business is a draughtsman and painter; I am a painter by trade. I was employed in the Locust Grove Hotel in 1879. I went there the middle of April and stayed there until the evening of the fire. I was general superintendent of the pavilion. I made the diagram hanging here. (The witness describes the pavilion, the situation of the oil-room.) The length of the pavilion is about 250 feet and 60 feet wide. The lower part of the pavilion was not entirely open. Behind the music stand it was closed in by frames or screens to keep off the wind. Posts about a foot or ten inches square ran along from end to end of the pavilion to support the upper floor. I held the key of the oil-room. I presume I may say I had charge of it. I first went to the oil-room in May, I believe. I never had occasion to go in there. I was not in there more than once or twice during the summer. Schuschardt had the practical charge of the oil-room as to filling the lamps. He came there every day. He lived at Bath, about a mile and a half from the hotel. He was the night watchmam. His duties were to trim the lamps—that is, the kerosene-oil lamps—and fill them and have them ready for lighting in the evening—that is, on the pavilion. We used kerosene lamps throughout the entire pavilion and the kitchen and the hotel. There were torches there. They were used two evenings, I believe; two or three evenings before the fire, I think.

104 Q. Had those torches been in use on the pavilion on the premises at any time previous, to your knowledge?

A. No, sir. The first time I became aware of the existence of those torches was when I was informed by Mr. Gunther. One evening the pavilion was poorly lighted. He spoke to me about having it lit better, and he spoke to me about these torches being in the laundry, and he asked me why I didn't get them out and have them fixed and filled. That conversation was on the pavilion. I think he was sitting on a chair and I was standing near him. Up to that time I had never seen or heard anything about torches. In consequence of what Mr. Gunther said I gave directions to Schuschardt.

Q. What did you say to Schuschardt and what directions did you give?

(The plaintiffs' counsel objected. The court overruled the objection, and the plaintiffs excepted.)

A. To go into the laundry and get out these torches and have them lit up. The exact number I couldn't state; there were ten or twelve. I did not see them. That is the exact amount. There were four or five put upon the pavilion. I couldn't say the exact number there was; either four or five; I couldn't say four and I couldn't say five; there was four or five. I didn't see more than that number of torches. I only saw those that were in use, that were burning. There was two in front of the music stand and two in front of the lunch bar. They had a reservoir and a long pipe leading down, with a stop-cock; then an elbow put on the end
105 and carried out this way; and there was some kind of arrangement with a cup in under, and it burned in that way.

Q. What burned?

A. The benzine.

Q. How did the fluid get to the point where it burned?

A. Through this tube—this pipe.

Q. And what was the process of lighting?

A. Well, it used to drop into this cup, and it formed a kind of gas which made flame and light. When the light was applied this gas burned. I saw them lighted. Schuschardt had charge of that.

Q. Now, you say benzine was burning. How do you know that?

A. Well, Mr. Gunther told me to send down to Bath Park and borrow some benzine for to fill these torches. Well, no, I won't say that he told me to send to Furnell's or Bath Park. There was a little conversation we had before that about benzine. I couldn't say that I know whether there is any difference between naphtha, benzine, or gasoline. I can tell the difference between kerosene and benzine. There was no wick in the torch. They continued to be lighted up to the time of the fire. I was in the dining-room when the fire broke out. I seen the flash. I was at dinner. I cannot say there were lights in the dining-room. The whole building was burned down.

On his cross-examination the witness testified:

I was employed to attend to the bar and the pavilion. The key of the oil-room was on the gas-bracket or the kerosene-oil bracket behind the bar. Schuschardt got there about one or two o'clock
106 in the afternoon. He left in the morning about six o'clock. There were not less than four or more than five torches. I had not seen any of those torches brought out at all, only the torches that were used on the pavilion, lit up. I do not know the difference between gasoline and benzine. This is the third trial I have been examined as a witness. I had a partial examination at the coroner's inquest. The fire occurred on Friday night; Saturday the inquest was commenced, and it was adjourned until the next Tuesday, so I went with Mr. Walker to his home, in Plainfield. On

Tuesday I was requested to appear before the coroner. I was directed to stay. I gave all the testimony I could give in. After I left Walker's I went through the country painting Herrick's pills and plasters on the rocks—decorating nature, they call it. They generally call it a fence fiend.

Q. Didn't you swear on the coroner's inquest in these words? "I will swear that Mr. Walker had no gasoline about the premises nor did he have any lamps for its use."

A. I don't remember that testimony at all; it was never brought up on the coroner's inquest. There was nothing said about gasoline or benzine or how the fire occurred. I am pretty positive I never made any such statement to the coroner. There was a jury there, I believe, and I appeared there and was sworn. I was in Canada after the fire. I was sent for by a gentleman from the house of Butler, Stillman & Hubbard. You might call him a detective. I returned from Canada when my work was through. Between the fire and the first time I was sworn I went to Butler, Stillman &
Hubbard with Walker. I made a statement there. It was in
107 writing, but it wasn't sworn to. After I made that statement
I called on Mr. Gunther. He was at Bath, at his son's house; Mr. Gunther and his son George and also, I think, George's father-in-law, Mr. Young.

Q. Did you state there that Walker was to receive a certain sum of money, and that you were to get some portion of it—he had offered you some of it?

A. No, sir.

Q. Did you state that Walker was to get a thousand dollars from the insurance company? Did you state in the presence of Mr. Gunther and his son that Walker was to receive a thousand dollars, and he offered you some portion of it?

A. No, sir; the remark was never made. I am positive, because the remark was never made; the subject was never brought up at all.

Q. Didn't Walker tell you that if this claim was defeated he was to have a sum of money, and didn't he promise you a share of it?

A. I heard him make such remarks as that. Walker said that he was going to get something out of the trial, I believe, or something like that. I think that was said in Plainfield shortly after the fire. He did not state the amount. He never promised me anything at all.

Q. Didn't he say anything to you about your having some of it?

A. He said I wouldn't be left; that was about all. I know Lane, the photographer. I think I saw him in Philadelphia in December, 1880. I was still decorating nature.

Q. Did you on that occasion tell Lane that John E. Walker was
to get a thousand dollars from the insurance people, and that
108 he was to give you $200 besides your board, and that Walker
was keeping you to testify in the case?

A. I never had any conversation about the fire at all. I never said anything of that import to Lane. We had a few words about the fire, and that is about all. There was nothing like that said by

me to Lane. I am certain I did not say to Lane that Walker was keeping me to testify.

Q. Didn't you tell Lane that you had bribed the servant to get away, and gave her twenty-five cents so that Walker could not see you go away?

A. No; I didn't give the servant anything.

Q. Did you state to Lane that you had become distrustful of Walker; that you were satisfied that you wouldn't get anything from him, and that you hired the servant girl and gave her twenty-five cents to get your valise out of the house, and that you stole away and went to Philadelphia?

A. I never had any conversation with Lane about the fire or in regard to Walker at all. I met him there merely as a casual acquaintance.

Q. And said nothing of the kind?

A. We had a few words about the fire, of course, but nothing in regard to the insurance or anything of the kind.

Q. Did you tell Lane on the same occasion that you had been up in Canada, and about your being necked up there by a detective, or something of that kind, and that you got away from him? Did you use that language?

A. I don't believe I did.

Q. Did you say anything to that effect?

A. I had told him that I was in Canada; I might have,
109 because my business was traveling all the time. I don't know as there was any word mentioned about detective. I might have told Mr. Lane on the same occasion that I stayed with Mr. Walker all winter—pretty near all winter—after the fire.

Q. Did you say to Mr. Lane on that occasion that you thought you would never get it—that is, the money—and that you stayed there long enough, until you slipped away?

A. There was no conversation between Mr. Lane and I in regard to insurance or Mr. Gunther's case at all. We had no conversation in regard to the fire; none at all. I don't remember that I had a conversation with Lane in which I told him I got a suit of clothes out of Walker. I got one suit of clothes in the summer from Mr. Walker and he charged them to me—that is, he took it out of my salary. The second suit he took me to Fulton street and ordered the clothes, and I paid for them with the money I had earned on the road. I don't remember on the same occasion saying to Mr. Lane that I would not be a witness on this case, referring to the insurance case, and I was going to stay away. I don't think that I stated to Mr. Lane that Walker was such a notorious liar that I did not believe him. I might or might not have told Mr. Lane on the occasion that the insurance company had sent a detective for me to Canada. I remember testifying on the last trial that I was in the dining-room eating my dinner at the time of the fire, and that is true. I remember testifying to the question put to me, "What light were you eating by?" that "I think it was daylight."

Q. And that is true, is it?

A. I think it is. I recollect testifying on that occasion the
110 last time I had seen Schuschardt, before I saw him with his hands thrown up, I saw him come out of the oil-room after he had filled his lamps. He brought the key of the oil-room; I had charge of the key. That is true. I recollect also testifying that "that was four or five o'clock." That is true; that that was the daily occurrence of his coming, about that hour. He was the night watchman. Between the time of the fire and the time I called at the house of the son, in Bath, I saw C. Godfery Gunther but once. I swore that I called at his request at Bath Beach. I received a telegram from New York sent to Toronto and forwarded to me where I was to call and see him.

Q. Do you recollect this question being put to you and your answer at the last trial? "Q. Did you say there on that occasion that Walker wanted you to swear that you had heard Gunther order the benzine; that he was going to get a good stake and would divide with you if you would swear so on the trial in this case? Did you say that in conversation on that Sunday at young Mr. Gunther's house, or anything in substance like that? A. We had a conversation in regard to the burning of the hotel."

A. I recollect that question being put to me and I recollect the answer.

Q. And it was true?

A. Oh, yes; that was in the way of conversation——

Q. Never mind; you have answered.

On his redirect examination the witness testified:

The principal lights on the pavilion were the kerosene oil lamps, with reflectors behind the flame. There were also railroad
111 lanterns. They had two colors, red and white, and those constituted the main means of lighting.

Q. And up to the time that you spoke of in your direct examination, when these torches were hung up, these were the means of lighting?

A. The only means of illuminating the pavilion.

Q. Now, with the exception of these torches that you describe, two in front of the music stand and two in front of the lunch counter and some somewhere else, were there any lights?

A. No, sir. I have given you all the lights that were there. It was Schuschardt's habit to come in the afternoon and stay all night and go away in the morning; that was his regular habit. He generally called me about half past five o'clock, and then he went away. He wouldn't leave the pavilion until I came down. I cannot state what time of day Schuschardt was on the place the day of the fire, nor can I state as to the time he was there the day before. He would light the lamps and then be around the building; sometimes he would go away before dinner. This Lane I met in Philadelphia when I was painting the fence, was a photographer. He hadn't anything to do with the Locust Grove Hotel. He was an independent photographer; he had a little house there of his own; he drank considerable. I saw him in court on one of the trials six years ago

last December. The time I had the talk with him in Philadelphia was in the winter of 1880. I was painting on the corner of Broad and Market streets, Philadelphia, a public thoroughfare. It
112 was in the morning. I should judge that Lane and I were together fifteen or twenty minutes. I was working at the time. I stopped working, and he took me through the part of the building there and showed me the plaster design of the building as it would be when it was finish. That is all. I don't remember whether he invited me to take a drink on that occasion.

Q. Was the whole conversation in and about the public buildings?

A. About that. It occupied about two or three minutes looking at the plaster cast. He went away and I went to work.

Q. Now, did he say anything to you on that occasion about the fire?

A. Well, he might have said something about it; I don't really remember, but the general conversation was about general matters, about meeting. He asked me what I was doing and I told him, and I asked him about what he was doing. I have not seen him since.

Q. He testified that you told him on that occasion that John Walker was to get $1,000 from the insurance people, and that you were to get $200 and board, and that Walker was keeping you to testify in this case, and that he was to get his board and $200 from the insurance people, and that you told him how you slipped away from Walker by paying the servant girl twenty-five cents to get away your valise without his knowing anything about it. What do you say to that?

A. I had no such conversation. It was a very simple matter to leave there.

Q. Now state what you know about the fact that up to the time of the fire Mr. Walker and Mr. Gunther had always been on good terms, as far as you could see.

113 A. As far as I could see. The fire occurred on Friday evening and the inquest was held the next afternoon—Saturday afternoon. Some of the employees left; ex-Mayor Gunther was there. Mr. Cropsey was the coroner. He presided over the inquest. Mr. Gunther was around, but I couldn't say whether he was in the building at the time the inquest was held or not. I was present, but could not say that I was present when the first witness was examined. Mr. Gunther told me to tell Walker to shut up about there being benzine in the building, because it would affect his insurance. His language was: "For God's sake, Hennessy, tell Walker to shut up about there being benzine in the building, because it will affect my insurance."

Q. Where was it that Mayor Gunther said to you what you have just stated to the jury?

A. Standing in the door of the wash-room, where the buildings had been burned down. It was on the grounds; a building that had been burned down. Walker at the time was around the wash-room. I couldn't say who took the testimony before the coroner; I think it was written down. I don't know who wrote it. I did not

sign it. I signed nothing. I left the coroner's inquest to go to Plainfield along in the evening. Walker and Mayor Gunther were together in my presence on the day before I left. They were talking together. I was not present at any conversation between them. They were off and on all the afternoon around the grounds. I saw them together before and after they had the conversation I have spoken of about the benzine?

Q. Now, I don't ask you what you said to Walker, but I ask you whether, in consequence of what Mayor Gunther said to
114 you, you said anything to Walker.

A. Yes; I lost at the fire my clothes.

Q. I will ask you this question: Whether from the time of the fire, as long as Walker lived, he ever in any way made any offer or inducement to you in reference to your testimony in any trial in reference to any claim of insurance.

A. No, sir.

Q. Made you any promise or inducement?

A. I heard him speak about the trial, but this was before the trial, before any trial had taken place, that Mr. Gunther had had some trouble about getting his insurance, and it was going to come to trial. Walker told me that. Walker said that Mr. Gunther was going to have some trouble about his insurance on account of there being benzine in the building. He said that he wanted or that the case was taken up, and that he would need the people that were working there for witnesses.

Q. Well, did he make you any offer? Did Walker make you any offer of money or anything else in connection with your testifying in this case?

A. No, sir; he did not at any time, to my knowledge. I went to Canada. I was sent there by an advertising house on Park row, New York. My going to Canada had not any reference to my being a witness in this case. I went to Canada before any trial was had. I was not here in March, 1881, when you say the Queen's case was tried. I left here for Canada on Decoration Day, and I got through along about the middle of October, 1880. While I was in Canada I received a visit from Mr. Simpson, who represented the attorneys for the insurance companies. I also received a telegram
115 from Mayor Gunther. The telegram was in these words: "No instructions to give. Call when you come to New York." I think that was it. That was in answer to my telegram. I telegraphed Mr. Gunther that Mr. Simpson was there and wanted to get me to appear against him in the fire case. That was when Simpson came to Canada. I cannot say whether I worded the telegram "detective" or "Mr. Simpson," but whatever it might be he has called on me and wanted me to appear against you in the fire case. I think I put in it "What shall I do?" I believe I sent the telegram the same evening that Mr. Simpson notified me I was wanted as a witness. Simpson came there, I think, on Friday and remained there Saturday and Sunday. I know he was there on Sunday because we took a walk together. It was in consequence of the telegram I found out where Gunther was. I think it was in December.

It was in December I went to George Gunther's house. I was in New York for some time before I went over there. It was December 19th, 1880. Well, we got into the subject of the insurance right away. I merely asked him how they came on — the trial. They had had a trial while I was in Canada.

Q. Well, go on and give the conversation.

A. I have given about as much as I can remember of the conversation.

By the COURT:

Q. The date of this interview between you and Gunther has been suggested to you once or twice in the questions put to you. Can you yourself, of your own recollection, give us an idea of the year and month that the interview took place? State as near as you can.

A. It was in the winter of 1880; I think it was in the month of December.

116 Q. Well, go on and give us the conversation.

A. I have given about as much as I can remember of the conversation.

Q. No; go on. I broke you off because I thought you were mistaken about the date. Tell us what occurred about the insurance.

A. Well, that is about the drift of the conversation we had, and general topics of the day. Mr. Gunther answered my question, but I disremember what he said now. I am unable to fix the date of the conversation; I think it was in 1881; it was in the winter succeeding my interview with Mr. Simpson.

Q. Was anything said on that occasion about the trial or about Walker?

A. The only thing I remember in the conversation was he asked me where I had seen Walker.

Q. Did you not tell him at that time anything about Walker's talk about what he was to get?

A. No; I don't remember that. I was there perhaps an hour; might have been longer than an hour; I couldn't state the exact time. I remember testifying at the last trial that it was daylight when the fire occurred. I had not been long at my dinner; I didn't finish my dinner. I also remember at the last trial this question being put to me: "Q. Well, it was between quarter after seven and quarter to eight? —. That is correct."

A. Correct. I saw Schuschardt just as he came out of the oil-room. I saw him with his hands up, this way, in front of the oil-room. He was not on fire. That was immediately after I saw the flash. I did not see the two boys, Marmion and Constine.

117 In the dining-room I was facing—well, when I left the dining-room and went out is the time I saw Schuschardt; I saw him on the outside. I only know from hearsay how he was burned to death.

On his recross-examination he testified:

Q. When did you make the statement that you swore to yesterday and signed for Mr. Notman?

A. Some time after the fire. It was not an affidavit; just signed a statement. It was made before I got back from Canada; it was before, because I had never seen Walker after I left Plainfield.

HENRY ZSCHOCKE testified:

I was cashier at the Bath Park Hotel. I know the two young men, Constine and Marmion. I recollect giving them directions to go to Furnell's, the Atlantic Hotel, on the evening of the 15th August, 1879. We used gasoline at the Bath Park Hotel.

Q. State whether or not on that evening and before you sent these young men away you were out of gasoline.

The plaintiffs objected. The court overruled the objection, and the plaintiffs excepted.

A. We were out of gasoline. It was about dark, and we found there was no gasoline there to light up the torches, and I told the boys to go to Furnell's and get two pails of gasoline. They went. We used gasoline in torches as well as in the tank.

Q. Did you know Schuschardt?

118 A. I don't recollect him; no, sir.

GEORGE J. SCHWENCK testified:

In the summer of 1879 I was employed at the Bath Park Hotel as hostler and general manager of the outside grounds. I had full charge of the kerosene and gasoline, especially the gasoline tank up in the tree, which lit up the pavilion. We used both kerosene and gasoline.

Q. In what way did you use gasoline?

Objected to on the part of the plaintiffs as immaterial and irrelevant. Objection overruled, and plaintiffs excepted.

A. We used gasoline on the pavilion. We had a tank in the tree from which the burners were supplied for the pavilion. Then we have two lights in the bar-room, of gasoline, but those lights in the bar-room were only used in the latter part of the season. There were torches there.

Q. Do you recollect on August 15th, 1879, whether or not you were out of gasoline?

Objected to on the part of the plaintiffs as immaterial and irrelevant. The court overruled the objection, and the plaintiffs excepted.

A. Yes, sir; we were out. I made the discovery. I generally filled the tank about between two and three o'clock in the afternoon, when there was the least guests around. I made that discovery and notified Mr. Pier between two and three o'clock in the afternoon.

119 Q. How was it as to your being supplied with or out of kerosene?

The same objection on the part of the plaintiffs; the same ruling by the court, and the plaintiffs excepted.

A. Just the day before I had received a full barrel.

Q. In consequence of your being out of gasoline, what did you do?

The same objection on the part of the plaintiffs; the same ruling, and exception on the part of the plaintiffs.

A. I notified Mr. Pier of the fact that I was out of gasoline.

Q. I will ask you if you knew Schuschardt?

A. I knew him by sight. I never knew his name until after the fire.

Q. But you knew the man?

A. Yes, sir. He was employed at the Locust Grove.

Q. Prior to the 15th of August, 1879, state what you know about furnishing to Schuschardt gasoline from your premises.

Same objection, ruling, and exception.

A. This man Schuschardt got the first time three gallons of gasoline from me; within—I don't exactly remember the number of days—he came for five gallons. The first time I drawed the three gallons of gasoline for him myself; the second time I happened to be in the dining-room and could look right out of the dining-room at the place where the gasoline was kept and the kerosene. I found this Schuschardt at the barrel of gasoline, drawing for himself. I then immediately rushed out and stopped him from drawing; told him it was under my charge, and I completed
120 drawing the five gallons of gasoline for him. I don't exactly remember what the vessel was, but the second time he had a square five-gallon can. He took the can with the gasoline in and he walked around the pavilion towards the road which I would go to Locust Grove. I recollect Constine and Marmion—the two boys employed at Bath Park—and their leaving our place on the 15th August. They took two wooden pails. The time the two boys, Constine and Marmion, left it must have been after five o'clock. I am most positive I can't fix the time, though, precisely. It was after I had discovered that we had no gasoline and made the communication I have spoken of.

Q. Did Constine assist you in filling that gasoline tank?

Objected to as immaterial; objection overruled; plaintiff excepts.

A. Yes, sir.

Q. You became familiar with the use of both kerosene and gasoline?

A. Yes, sir.

Q. How long had you charge of both gasoline and kerosene?

A. Well, especially gasoline, from the age of fourteen. I have used it in my trade. I never was at the Locust Grove Hotel.

On his cross-examination the witness testified:

I discovered we were out of gasoline about three o'clock. It was about five o'clock the two boys were sent off by Mr. Pier. Schu-

schardt was there frequently in the mornings, and sometimes
121 I found him around at noontimes. The last time he was there he went out of the park. He would have to turn to the left to go to Fort Hamilton; to go to Locust Grove, to the right. I recollect being examined at the last trial of this case. I recollect the question being put to me, "After he (Schuschardt) struck the main road you don't know which way he went, do you?" and I answered, "No, sir." I recollect it, and that is true. I also recollect this question put to me: "You don't know but what after he struck the main road he went toward Fort Hamilton?" and I answered, "I do not." That is, of course, true. I also recollect the question put to me, "This person to whom you say you gave gasoline twice went towards a certain road; is that the road to New Utrecht?" and I answered, "That road goes to Fort Hamilton, to Greenwood, to Furnell's." That is true. And I also recollect the question being put to me, "And Fort Hamilton would be towards the left?" and I answered, "That is true; that is the way he went, to the left." And I also recollect the question being put to me, "And Fort Hamilton would be in the opposite direction?" and I answered, "Fort Hamilton would be towards the left." That is true. And I also recollect this question being put to me: "And Locust Grove toward the right?" and I answered, "Yes, sir." It is true. I didn't know where Schuschardt lived.

By the COURT:

Q. Did Schuschardt turn towards the left or right?

A. He went towards the right. If he had went to Fort Hamilton he undoubtedly would have taken a short cut, because there was a gate out of the park towards Fort Hamilton and a gate at the other end.

122 By Mr. BUTLER:

Q. If he was going to Locust Grove that was the way for him to go?

A. Yes, sir.

By Mr. SMITH:

Q. He could have gone to the right or left after he struck the main road?

A. He could have gone either way.

By Mr. BUTLER:

Q. If he had gone to the left and kept on the road where would that have taken him to?

A. Fort Hamilton.

Q. How far is that from Locust Grove?

A. A good many miles.

By Mr. SMITH:

Q. There are two or three streets turn up between that and Fort Hamilton?

A. There is one as you go out of the gate runs to the village there, runs out where the proprietor or lessee lives, and there is another as you go out of the right-hand gate, goes to the railroad track, and there is another runs by the Bath Beach Hotel, which is the regular wagon road which I should take if I had any driving to do.

JAMES E. HAM testified:

I am employed at Fairbanks', the scale manufacturer. I have been there two years and a half. I am a son of Mrs. Walker by her first marriage. I am twenty-seven years of age. I think Mr. Walker died 25th of May, 1881. He died in the New York hospital. My mother died at Leona, N. J., on the 20th of May, 1882. I was
123 with my mother and her family at Locust Grove Hotel the latter part of May, in the summer of 1879, and remained there until the hotel was burned down. I was there most all the time. The pavilion was lighted the first part of the season by kerosene-oil lamps hanging on the posts. I saw several torches, three or four probably, hung on the pillars in front of the musicians and in front of the table or lunch stand, I believe. They were such a torch as you see on peanut stands—that is, with a tank at the top and a tube leading down and branching out below, and on the end sort of a ball; a little crank, I believe, under the ball—I believe a screw.

Q. Anything to hold the fluid?

A. I didn't notice anything. I don't know what was burned in those torches. The flame from them was a very bright flame, very red. It was nothing like a kerosene-oil flame in a lamp.

Q. Burning in the open air?

A. Yes, sir. I don't think there was a wick. There were no chimneys or shades. At the time of the fire I was eating my dinner. I heard an explosion and saw fire. I saw a large sheet of flame. It was about half past seven. It was dusk. It was a dark day, rainy at the time of the fire.

On cross-examination he testified:

I think there was a light in the dining-room. I could not swear to it. I am positive it was raining at the time. I saw the torches there for several weeks—possibly two weeks. They might have been there a month. I have been examined as a witness on all the trials.

124 GEORGE SUMNER, testified:

I was employed at Locust Grove Hotel in the summer of 1879, attending to the lunch counter on the pavilion: that was nearly opposite the music stand. I was there from five in the morning until the next morning. I was there all the time. I went there the first Sunday in June and remained there until the time of the fire. There were torches used for lighting the pavilion. There was one on each post immediately in front of the music stand and one behind it and one in front of the liquor bar, on a post. The torches

had been placed where I have stated about two weeks before the fire.

Q. Where had they been, if you know, before that?

A. Well, they had been placed all over.

Q. No; I am speaking now where they came from.

A. The kitchen. They were got out of the kitchen by the direction of Mr. Gunther and Mr. Walker. When they gave the directions I was standing right in front of my lunch bar. Mr. Gunther said to Mr. Walker, "Walker, you ain't got enough light on the pavilion; why don't you get them torchlights out of the kitchen and put them up on the posts?" I think on the same day or on the next morning I got the torches out. There were nine torches. I had nothing to do with putting them up. Schuschardt put them up, I believe. I never saw them filled. I have lighted them. I would take a piece of paper and turn the top, underneath the cup or saucer, and the oil ran in them, and this paper connected to the oil in the cup, and it would burn and the flame would drop down
125 to the ground, and then after a little while make a steady flame.

Q. You speak of oil; do you know what it was?

A. It wasn't kerosene; that is all I know. It did not smell like kerosene. The flame was a kind of blue light. The fluid in the little cup would take fire and a large blaze would go up, accompanied by a dropping of flame and afterwards a steady light, the same as gas. I recollect an occasion when I noticed the dropping of the flaming fluid when Mr. Gunther was by, and he told me to put the box underneath the light so it would drop into the sand. This was a day or two before the fire, I think. I ain't sure.

By Mr. SMITH:

Q. You say part of all these nine torches were up?

A. First half; yes, sir.

Q. And how many days was that before the fire?

A. About two weeks, I think; might be longer. I ain't sure.

Q. But at least two weeks?

A. Yes, sir; about that.

Q. How long did those nine remain there?

A. Oh, two or three days; somewhere along there. I ain't sure.

On cross-examination the witness testified:

I have been examined on all the trials in this case and in the Queen's case. Both Walker and Gunther told me to get those torches from the kitchen. Five of the torches were taken away. I took them over to Mr. Miller. Mr. Gunther gave me a card and told me to give it to Mr. Miller, No. 194 Water street, New York, I think a couple of doors from the United States Hotel, and nobody else. I testified on the previous trial that I took them to
126 Miller & Eastmead; that is true. I believe on the last trial I testified that I took those by the direction of Mr. Walker. I took those torches there myself. I had a brother at the hotel; his name is Fred. Sumner. I know William H. Frickie. I never said

to Frickie that I had received three dollars a day from this company and a new suit of clothes, nor anything like it. I know Frickie very well. There were about forty colored lanterns put up there about two weeks before the fire. I never got those torches back that I took to Miller & Eastmead's. I sent there twice.

On his redirect examination he said:

The torches I took from the kitchen had been there from the former season. I was there the year before.

Q. What condition were the torches in when you took them from the laundry?

A. Well, some of them used to leak; the first time they all burned up; the nine put up at the first time, five leaked, and had to be taken down and had to be sent to Miller & Eastmead. I left them there. The four torches that were not taken down and sent to New York were in good condition, and they continued to burn until the night of the fire. The whole nine were burned two or three nights.

MARY LIZZIE BOGART testified:

I was at Locust Grove Hotel in the summer of 1879. I used to go there occasionally in the evening. I lived at New Utrecht, about two miles from Locust Grove. I was living with Mr. Deacon.
127 I don't know who he is. He lived at New Utricht, and I was in his family. I used to go once or twice of an evening to Locust Grove during the week. I recollect the fire there.

Q. And you recollect being on the pavilion a few evenings before the fire?

A. Not inside of two weeks, I guess, or 3. I noticed the lights there one evening attracted my attention because the fire was dropping from them. That is the only thing that attracted my attention—the fire; the blaze, of course, had dropped on the floor. It was a round metal hung around a post. It came from a round metal globe just like a gas-jet, and it was hung against a post. I did not notice the lights more than one occasion.

On cross-examination the witness testified:

I was a servant at Mrs. Deacon's; did general housework. I am a sister-in-law of the witness, George Sumner.

CAROLINE STEHLEIN testified:

In the summer of 1879 I lived at Unionville; that was about fifteen minutes' walk from Locust Grove Hotel. I went there, to Locust Grove Hotel, sometime with my husband. I was there the Sunday before the fire, in the evening. I saw about four or five torches there. We were sitting by one post where the torches was burning within the place; two were on the outside post, one by the lunch counter, and one by the bar. We were sitting by the one on the outside post. The waiter came to light the torch and it
128 wouldn't light, and my husband took his chair and stepped onto it and showed the waiter how to light the torch. The waiter had matches in his hand. My husband struck a match he

had in his pocket to light it. He lit one of the matches and lit one of the torches, and it dropped in the spittoon below.

Q. The gasoline?

A. Yes; I can't describe much about the torch. It was a kind of upon a post and a little peg on it, on the end where the gasoline was burning. I didn't take much notice how it was.

On cross-examination she testified:

My husband was in the employment of Mr. Gunther. He leaved the fall before the fire, in 1878. I knew Schuschardt. He lived in Bath. I could at that time tell the difference between gasoline and benzine. I could tell it by the smell. I used it to clean clothes.

Q. Any difference in color?

A. No particular; gasoline is white; that is all I know.

Q. Do you think you can tell the difference between kerosene?

A. Oh, yes; I can. I don't know the appearance of kerosene if it should drop down from a lamp. I seen these torches two or three weeks before.

By the COURT:

Q. You answered the question that was put to you as to whether you knew the difference between benzine and gasoline. Did you understand the question that way, or did you understand it between benzine and kerosene?

A. I said I couldn't tell the difference from benzine and gasoline.

Q. How about benzine and kerosene?

129 A. This I could tell better.

By Mr. SMITH:

Q. Could you tell it by the flame? I asked you if kerosene dropped down what effect would that have.

A. I don't know.

Q. You don't know?

A. No, sir.

Q. Then you saw this drop down, you say?

A. Yes, sir.

Q. And you judged from the light itself that it was gasoline?

A. I judged from the smell. I smelled this gasoline, and I know it was there.

Q. That is all you know about it?

A. That is all I know about it.

By Mr. BUTLER:

Q. You never have seen kerosene drop down from such torches?

A. No, sir.

Q. And what was the smell that you perceived at the time you saw this dropping fluid?

A. I could tell by the smell, because I used the same to clean clothes, and it was the same smell.

Q. And what about the flame?

A. It dropped down in the spittoon from above in flames, white flames.

ROBERT H. BROWN testified:

I was leader of the band at Locust Grove Hotel in the summer of 1879. The band was composed of four at the time of the fire. I went there the Monday after the fourth of July. The band played off and on during the day, and sometimes as late as nine o'clock in the evening; pretty much every evening. I was there per-
130 sonally every night the band played. I know there was torches on the pavilion in front of the band stand, or at least on the sides, one on either side that I knew of. I don't exactly remember any other torches, but I know they were in front of the stand, because I saw them lighted myself. There was a vessel on top of the torches to contain the fluid; then there was a pipe running down, then an elbow, and then the part where they lit the apparatus. I saw the torches lighted by the attendants. They turned a kind of cock or something to let the fluid run down, and then they lit it and it caused a flame, and the torches fell down in a spittoon filled with sand. There was a large blaze, and then small drops of flame would drop from it. I don't know whether there was any wick there. I don't know how long the torch was there. I saw it frequently. I saw Schuschardt lighting them.

On his cross-examination he testified:

I never saw the torches filled, and I would not notice whether there was a wick or not.

PETER SPEDICK testified:

I am a musician and one of the band at Locust Grove Hotel in the summer of 1879. I was there three times a week. I saw torches on the pavilion before the fire in the neighborhood of the music stand. The torches got a kind of tip on top of a long pipe; then there is another pipe put on with a kind of plug, a kind of cup, so when that is filled and lighted, of course then the rest of the
131 blaze then drops out of that; then it have a light. The blaze drop on the floor and make white flame and kind of red, and then gradually get steady. There is sand in the box at the bottom. There were about five or six torches. We had one on the post, one across on the lunch counter, and the other further back.

On his cross-examination he testified:

Q. How many weeks were these torches burning, do you think, before the fire?

A. Oh, about three or four times that I saw them before the fire.

Q. How many weeks do you think, three or four weeks, before the fire?

A. I don't know if it was three or two. It was three nights in a week. I told you I saw those torches burn two or three weeks before the fire.

JOSEPH H. STEHLEIN testified:

I lived in Unionville in 1879. That is about a mile or a little less from the Locust Grove Hotel. I am in the fish business. I supplied Walker with fish. I was in the habit sometimes of going to Locust Grove Hotel in the evening. I was there with my wife and family on the occasion that she testified. That was on the Sunday evening before the fire. It was a little before dark. On that Sunday evening the waiter that lighted the gasoline torch didn't understand how to light it, and I knowed him by sight, and I just stepped on the chair I was in and showed him how to do it, showed
132 him how to light it, and the flames dropped down in the box. I knew it was a gasoline torch. I knew it was gasoline, for I done that the year before I was on the premises. I was in the employ of the Locust Grove Hotel in 1878. Torches of that description were in use in 1878. They had the same appearance. I didn't see the fluid put in — 1879.

By Mr. BUTLER:

Q. But you saw them yourself in 1878?
A. I did.
Q. And you know what part of the torch the fluid went in?
A. I filled it myself; nobody but myself did it. I had charge of the gasoline torches and of the gasoline.
Q. At that time the gasoline was kept in the gasometer?
A. We had a place about fifty or sixty feet from the main house where we brought it in barrels and put it in a machine, and nobody went to the machine or put it in the machine but myself.
Q. And that was brought by pipes to the house?
A. To the main house.
Q. And there it was lighted just as you light gas?
A. Just as you light gas.
Q. Now state to the jury about the use of these gasoline torches in the summer of 1878.

Objected to. The court overruled the objection, and plaintiffs excepted.

Q. Now state to the jury about the use of these gasoline torches in the year 1878.

Objected to as not within the life of the policy. The court overruled the objection, and the plaintiffs excepted.

133 A. They were using them in the grove. They went from the main house in a tree—not on the pavilion—in the grove, in 1878, to light up the grove for the guests to come in and out. The gasoline was discontinued at the end of 1878. When I left, in 1878, I let it run away before I left the place.

On his cross-examination he testified:

I am certain I saw those torches there two weeks before the fire—perhaps three weeks. There was about four or five of them.

Q. Did you state at any time to George Gunther that Mr. Furman had been to see you and wanted you to come and testify that you had seen benzine or gasoline burned there?

A. Never did; never talked to him.

Q. Did you ever say anything to ex-Mayor Gunther?

A. No, sir; because Mayor Gunther asked me a question.

Q. Didn't you state to ex-Mayor Gunther in the presence of his son that you didn't know what was burned there except kerosene?

A. No, sir.

Q. Wasn't that in the presence of George Gunther?

A. No, sir. I had a conversation and George Gunther was present. I know Edward W. Morris, the treasurer of the town of Gravesend. I know him well. I did not call upon him ten days or so after the fire.

Q. Didn't you see him about that time?

A. I saw him very often.

Q. Did you call on Mr. Edward W. Morris at his house to pay a little bill for fish?

134 A. I called on Edward Morris about sixteen years ago and I was insulted, and I never put my foot in there again.

Q. Did you have a conversation with Edward W. Morris about ten days or so after the fire in regard to the fire?

A. I took a load of stuff down to New York for Mr. Morris, and he rode in my wagon, speaking about the fire. I had no conversation, only what I told you.

Q. Did you state to Mr. Morris on that occasion? "They could not use gasoline; they could not burn it; the lamps were all burned, and when Mr. Gunther discharged me, the fall before, they used to keep it in a small hill, and he told me to let it run away, and I did let it run away."

A. That is not true, because Mr. Gunther never discharged me; I left of my own accord; I never was discharged. I had no conversation, nothing of the kind, nor the substance or effect. I am now in the bottling business, liquor business, at Long Island.

On his redirect examination he testified:

I couldn't tell you whether Mr. Morris was town treasurer at that time. I know the man. The conversation I had with Morris—I told Mr. Morris I took a load of fish down to Fulton market, and I told him they didn't burn gasoline. The season before I run the gasoline out into the sand; run it out every fall.

Q. Now, the fact was, wasn't it, that they did not burn gasoline in 1879 in the house?

A. They didn't burn it in the house at all. The pavilion never had any pipes for gasoline; and I didn't ever tell Mr. Morris

135 or any one else anything different. The conversation I had with Mayor Gunther when his son George was present was opposite this court-house, when one of the trials was going on. The conversation I had with Mr. Gunther—he met me on the sidewalk, and he says, "You are just the man I like to see in this case; you know all about it." So I listened to him as he talked, and I said,

"Mr. Gunther, if I am called on the stand what do you want me to tell—the truth or a lie?" and he said, "The truth;" and I said, "You commenced to use gasoline;" and then he began to curse and use language—lots of cursing—and he asked me to go and see Mr. Lansing, and so and so, and George Gunther never opened his mouth to me.

On his recross-examination he testified:

Mr. Lansing I referred to was a lawyer on Court street. I know Mr. Furman. He is a detective, and subpœnaed me for the insurance company. Mr. Furman sent me to Mr. Lansing, and I went there, but would not give him any information.

WILLIAM H. MORRIS testified:

I live at Unionville, near where the Locust Grove Hotel was. I was familiar with those premises in 1878 and 1879. I was employed on the wharf of the Locust Grove Hotel in 1879; took the lines of the steamers; lit lights on the dock. I painted the club-house on the dock. I had occasion to go into the oil-room for signal oil, kerosene, and likewise for paint, turpentine, and so on; benzine occa-
136 sionally to put in the paint.

Q. What did you get in the oil-room?

A. Signal oil and kerosene and paint.

Q. Ever get any benzine?

A. I did.

Q. State when and in what quantities you got benzine.

A. I got it out of a can and put it in my paint; not over a pint. During the summer of 1879 I was in the oil-room nearly daily—every day. The first time I got my key from Fred. Sumner. After that I had access to it daily. It was open whenever I wanted to go in. I did not carry a key; did not apply to any one for a key. I went in after ten o'clock, and always found it open or somebody there that would open it. I was in the oil-room within two days of the fire. The room was about fifteen or eighteen feet long. They had tubs of paint, cans of oil, turpentine, and barrels of oil of different descriptions; different sizes, not less than four. I got the benzine from a can. I knew Schuschardt.

Q. State to the jury how much benzine altogether you took from the oil-room in the summer of 1879.

A. Not over a half gallon, I don't think. I went there about four times to get that half gallon of benzine. I put it in paint to paint the fence. I don't know the object of putting it in the paint. Mr. Gunther ordered me to do so.

Q. Had you mixed paint for Mr. Gunther?

A. I guess it was already mixed, with the exception of benzine. I had a conversation with Walker with regard to putting in a barrel in that oil-room. That was about two weeks before the fire. I went up to the hotel to pay him some money. The barrel
137 was in front of the hotel; in front of the hotel, towards the dock—going down to the dock. The barrel was not in the usual place of discharging at the hotel. It was put on the grass.

There wasn't any one present besides me and Walker. Schuschardt was in the shooting-gallery. I put that barrel into the oil-room at that time by the request of Walker. I put it upon a step going up. I saw the fire. I was just coming from my supper. It was between seven and eight o'clock. I heard the explosion and saw a terrible light. It was a red light. I think the lights was lit in the hotel. I won't say positive.

On cross-examination the witness testified:

I should think the oil-room was about twenty feet long and about twelve feet wide. The nearest barrel I saw in the oil-room was not within six feet of the door. The end or head of the barrel was not towards me. It was lying on the side. There were not less than four barrels in the oil-room. I saw them distinctly. That was the last time I was there. That was two days before the fire. I am quite positive of that. It was an ordinary sized barrel. We had to go up a step from the ground to the oil-room.

Q. Who helped you get in that barrel?

A. William Schuschardt. I am positive of that. I helped turn it up on the end. I rolled it about eight feet from the door. The barrels were all in a row there. They were about six feet from the entrance. I rolled this barrel behind the other, further than the other.

138 Q. Then they were not in a row?

A. They was in a row when I put them in a row. It was about half past ten o'clock.

Q. Did you testify on the last trial that you got benzine there for the purpose of painting the club-house?

A. I did not; I said I got it for painting the fence.

Q. Do you remember this question being put to you at the last trial, and your answer? "Q. How many times did you get benzine out of that oil-room? A. Benzine? I got it while I was painting the club-house; I couldn't say how many times. I was two weeks or more painting the club-house."

A. I did. That was true. I painted the club-house in June or July, 1879. I used white, blue, and brown paints. I used benzine for that purpose. I commenced painting the fence after I had done the club-house. That fence was around the club-house. It was one job. I had partly painted the club-house before he told me about putting benzine in it. I made no distinction. The club-house was about three hundred feet from the hotel. I lighted the lamps around the wharf and club-house; Henry Rogencamp also. I kept a stand there—clams and oysters, crabs, and so forth.

On his redirect examination he testified:

(The witness described by reference to the diagram where the oil-room was and where he entered.)

Q. In that way you got into the back of the oil-room?

A. Yes; that was the only way you could get through it, unless

you went through the window. I never entered the door that
139 opened out on the lawn; I always went around. I never got any benzine, either in painting the club-house or fence, except from the oil-room, out of one can only.

Q. That is the barrel of gasoline that Mr. Walker asked you to roll in?

A. That is what he said—to roll in the barrel of gasoline.

On his recross-examination he testified:

I think it was about two weeks before the fire I rolled in the barrel, and that is the one I am speaking of.

Q. How did you know it was gasoline?

A. I don't know, only I was told to do it, and that is all I know about it.

HARMON W. CROPSEY testified:

I lived, in August, 1879, in the neighborhood of the Locust Grove Hotel. I was living at that time with my father at Unionville. My business is lumber and building materials. I was sometimes in the pavilion of the hotel in the evening. I remember the fire.

Q. Now, I call your attention to the evening immediately preceding the fire and ask you if you noticed any torches used for lighting it.

A. I did; I cannot say as to the exact number; probably four or five or half a dozen.

Q. Please describe those torches.

A. They were the ordinary torch used for burning gasoline, with a tank, a tube running down, with the elbow attachment. I presume I saw them lighted sometimes; I haven't any particular recollection of that. I am no more familiar with gasoline torches than that
140 I have seen them used in different places. I was there the night of the fire; I got there just before dusk; it was just in the evening. I was going to Coney Island, and I stopped in there, waiting for a train. I sat on the pavilion opposite the upper end of the bar. My attention was directed by the flash of light over my left shoulder. The fire broke out behind me. I ran right down off the pavilion towards the fire. I didn't notice the color of the flame.

Q. Did you see the flame shoot out?

A. I saw the fire; yes, sir.

Q. And what did you notice at that time as to the color of the flame?

A. Oh, I didn't notice anything but the fire, the flame; it came right out of the doorway.

Q. State, from your present recollection, whether or not the flame had a bluish cast and looked as if it had come from fluid.

A. I don't remember as it did at that time, what I saw over the door. I think at that time the pavilion was only partially lighted. I think there was one light in the end of the building near the road; that was sort of bull's-eye, and I think there was a few lights around the bar partially lighted. I couldn't fix the time of day; it was just at dusk.

On his cross-examination he testified:

I have been examined as a witness on several of these trials. I don't think there was any explosion. I was 100 feet from the fire.

Q. There was no explosion that you heard?

A. I can't say there was.

141 To the defendants' counsel the witness said:

On the first trial I testified that the torches were there, and when I came on the other trial I hadn't looked over my testimony and I had forgotten it, and I wouldn't swear to what I had testified. That is the way that happened. Now I have looked the testimony over, and I testified that in the first place, and I knew it was true.

To plaintiffs' counsel:

Q. Now, after reading your evidence, I ask you, from your present recollection, whether or not, in the summer of 1879, just before the fire, these gasoline torches were in use on the pavilion.

A. From my present recollection I couldn't swear positively. It is the same as it was on the last trial. I remember seeing torches burning at some time either in 1878 or 1879, or it may have been before that. I cannot tell whether it was before or 1878 or 1879. I was on the pavilion from the time when it was first built until it was burned, occasionally, at different times.

HENRY EDWARD PARSON testified:

My regular business is the refining of petroleum. I am — present engaged in the manufacture of apparatus for oil refineries and in petroleum for the last twenty years. I am thoroughly familiar with the various products of petroleum by distillation. Gasoline and benzine are two of those products. The crude oil contains all the lighter and heaver products. I mean by crude oil petroleum
142 just as it comes from the rock. The process of distillation is by putting the crude oil in the still, and the fire is placed under it and it is closed up, and as the fire is placed under the still the heat is generated, and first a very light gas is thrown from the vapor pipe, and then the very lightest product which is distillable comes off, then the product called gasoline, running from 80 to 90, giving an average product of about 85. Those figures mean that there is an instrument used, which I could show you as to how these gravities are obtained. Those relate to gravities. The density of the spirit is shown by these figures. It determines the density of the fluid you are taking off.

Q. Now, what I want to get at is as to these two fluids, gasoline and benzine.

A. The spirit of the oil runs all the way from 90 down to 60— that is, in specific gravity; that is called the spirit family of the oil. All of the material from 60 upward is spirit; all below 60 enters into the oil of commerce, and there it is subdivided into one or two divisions. The spirit is divided into several divisions, and they are used for different purposes.

Q. Now, then, as to gasoline and benzine, state to the jury to what extent these fluids are inflammable.

A. It is all spirit, and this spirit is volatile and when exposed to the air will all evaporate. In evaporating they throw off a very sharp gas, and these gases are very heavy. If you pour out a small sample of the spirit, whether light or heavy, it will evaporate; the lighter it is the quicker it will evaporate. If you pour it out you will find the gas will evaporate and it will fall below the cup
143 that holds it. That arises from the fact that it is heavier than the atmosphere; and if you put a match above this vessel you will find that you will have to put it down very close before it would ignite, but if you put it below it it will ignite at some distance from the vessel, because it is falling all the time. This vapor is the gas as it evaporates in the atmosphere. It is the natural spirit of petroleum. The process of distillation and refining is to separate this spirit from the oil. Gasoline is more inflammable than benzine, because it is higher gravity. Benzine is inflammable, but not quite as pronounced as the higher grades. It doesn't evaporate quite so readily, but either will throw off gas if exposed to the air, and when exposed to the air and ignited from a light at a distance that which burns is the gas or vapor thrown off by this natural evaporation. Kerosene of commerce, by which I mean kerosene oil of 150 fire test, is produced from petroleum after this spirit is driven off. Then we start with 60 gravity for the purpose of taking off 60 of commerce, and they proceed with the distillation until they get 150 test—that is, it will not ignite until it is heated up to 150 degrees. That 150 degrees has nothing to do with gravity; it has reference to the degree of the Fahrenheit thermometer. If kerosene oil of 150 fire test is produced, and if it is in an open vessel, it does not throw off any gas unless heat is applied to it. It would not throw off any gas in the atmosphere of this room, and if you had a bowl full of kerosene oil of 150 fire test it would not throw off any vapor or gas, and
144 if you put a lighted match to it it would put it out just like water. As to gasoline or benzine, if you put a match anywhere where vapor falls down from it, it would ignite perhaps three or four inches from the surface. I did not mention naphtha that is sometimes called benzine, sometimes benzole, sometimes naphtha, sometimes gasoline. They all mean the same thing. They are all dangerous owing to the fumes they throw off.

Q. Please describe the general character of these naphtha or benzine torches.

A. There is usually a font made of metal, holding from a pint to a quart; usually about a quart. There is a cup on top of it and from that a pipe leading down to what we call the burner, and in this burner there is plates usually exposed, whereby the heat will operate upon the fluids because they are very light and generate at a very low temperature. They operate upon these and throw the vapor off into gas, and as this heat continues this fluid is fed down through this tube, governed by a valve on the bottom that throws off into a sharp flame when lighted that which burns in the gas evolved by the heat. In 1879 I was familiar with this kind of torch and have

been from the first of it. They were largely in ordinary use and a well-known article of commerce. They were made to burn the spirit of petroleum. You could not burn kerosene oil in them because the fact is they would not vaporize. They would not burn without smoke. You might as well burn a kerosene lamp without a chimney as to burn kerosene oil in them. You could not in one of those torches in
145 1879 burn or use them in the open air except with gasoline, benzine, or naphtha. They had no wick. Kerosene oil you burn with a wick, for that feeds up the oil by capillary attraction and feeds up the oil to the point of ignition, and it must have a conductor; whereas the more volatile fluid throws off gas enough to keep up the combustion all the time.

Q. Now, I am going to ask you a long question. Assume this case: A room in the basement of a frame building at Locust Grove, near Bath, Long Island, the dimensions of the room being about twelve feet square, seven or eight feet high, entered by a door opening into the room from the open air off a space of grass; the time about dusk on August 15th, and that at such time and place a man and two boys go into the room, leaving the door open, the boys each carrying an ordinary open wooden water pail, the man carrying an ordinary closed stable lantern, lighted, the light being inside the glass lantern with a wire frame outside the glass, and the lantern having open air holes at the top; that the man placed the lantern on the door sill, from which there was one step down to the floor; that the man then drew fluid from the barrel or half barrel that was inside of the room some feet from the door sill into one of the pails through a piece of pipe which had been driven into the end of the barrel or half barrel and stopped with a wooden plug; that he drew the fluid until the pail was filled and then found the pail to leak and to have leaked some of the fluid onto the floor; that the fluid in the leaking pail was then poured into the other pail; that the man proceeded to fill a can from the same barrel or half barrel; that he moved the lighted lan-
146 tern from the door sill nearer toward the barrel or half barrel, placing it some distance from the barrel or half barrel on the floor; that there was no other light in the room except the lantern; that fumes came from the fluid in the open pail which was standing on the floor; that while the man was filling the can a rumbling noise was heard and a bluish flame was seen sweeping or drawing over the floor toward the lantern, as though swept with a broom, and immediately the whole place was a mass of flame, setting the two boys' clothes on fire, forcing the three persons in the room to rush out, the flames bursting through the open door and immediately communicating to the wooden structure overhead, causing the speedy destruction of the entire building. Assuming the above facts, and also that all this happened within the time it took to enter the room and to do the acts above described, *and* state what, in your judgment, was the fluid which was so drawn in the vicinity of the lighted lantern.

A. I should say distinctly that the fluid that they drew from that barrel was the spirit of petroleum—that spirit that came from the

barrel. I mean one or the other of those fluids I have described as containing the spirit of petroleum, either gasoline, benzine, or naphtha. It could not, in my opinion as an expert, have been kerosene oil of 150 fire test, because the spirit that contains that flame was taken from it when it was manufactured. However inflammable these fluids, there is no danger from spontaneous combustion; there must be a fire. The kerosene would not ignite until you got a temperature of 150 degrees Fahrenheit.

147 On his cross-examination the witness testified:

The first torch I manufactured was in 1870, as near as I can remember. I did not go into the general manufacture. I just made them for experimental work. I probably manufactured a dozen; never manufactured them for sale. After 1870 I did not manufacture any for experimental work. I did not manufacture any after that.

HENRY V. BEECHER testified:

I am in business in the city of Brooklyn and agent in this city of the defendant. I recollect issuing the two policies on the Locust Grove Hotel property and furniture to Mr. Gunther. The policies are marked on this trial Exhibits 1 and 3. I recall them. I personally issued them to Mr. Gunther.

Q. Will you please look at the two writings, partly in print and partly in writing, which are pasted on the face of the Exhibit No. 1, the building policy directly under the semicircular heading containing the title of the company, and state at what time those two paper-writings were affixed to that policy?

The plaintiffs objected to the question as incompetent and irrelevant. The court overruled the objection, and the counsel for the plaintiffs excepted.

A. They were attached to the policy when it was issued.

By the COURT:

Q. Issued with them attached?

148 The counsel for the plaintiffs objected on the further ground that the policy cannot be affected by the time the rider was put on.

Mr. BUTLER: I wish to state that we do not offer the evidence for the purpose of varying the policy, but simply for the purpose of showing the time when the rider took effect. I want that to appear on record, because the writing on the margin of the policy is dated and it speaks for itself. The rider has no date; therefore this evidence of Mr. Beecher was offered for the purpose of showing where, as a matter of fact, the physical act of attaching the rider to the policy took place.

Mr. SMITH: I object to any statement from counsel about it.

Answer. Yes, sir; I put my full signature—our firm signature—

on one and my initials on the other. It is my handwriting and made when the policy was issued. Our firm is Beecher & Benedict.

Q. Now, look at the other one—at the little paper pasted on the side near the foot of the policies—which reads as follows: "Privilege to use kerosene oil for lights; lamps to be filled and trimmed by daylight only. Attached to policy 2,255,927. B. & B., ag'ts." When was that put on?

The plaintiffs' counsel objected to the question on the ground that it is incompetent, irrelevant, and immaterial. The court overruled the objection. The counsel for the plaintiffs excepted.

Answer. That was put on at the time of the issuing of the policy.

149 Q. I ask you whether these two writings pasted on both policies and both reading in the same language, except the number, and both signed B. & B., agents, were your ordinary kerosene privileges?

Objected to. Objection overruled, and plaintiffs excepted.

Answer. Yes, sir. It is the usual form. It is always our habit, whether our client asks us or not, to put that clause in our policies.

Q. Do you recollect the writing of the words on the margin of Exhibit No. 1, "September 17th, 1878. Privileged to keep not exceeding five barrels of kerosene oil on said premises. B. & B., ag'ts." Whose handwriting is that?

A. That is Mr. Maxwell's handwriting. He was our clerk at the time. He is dead. I recognize his handwriting. He was at the time our main clerk—had charge of all our finances and the general run of the Brooklyn office.

JOHN J. HOLLY testified:

I am a member of the firm of Lockwood Brothers & Holly. We are examiners and analyzers of petroleum. I am acquainted with the different products of petroleum. I have been engaged in that business since about 1866. I am familiar with the fluids commonly known as gasoline and benzine and naphtha. They are produced by distillation from the crude petroleum. They are highly inflammable. The vapor gas from gasoline or benzine will ignite the moment it comes in contact with fire.

150 Q. What is the fact in regard to the ease and rapidity with which the fumes a [or] vapor of gas given off from gasoline or benzine will ignite?

A. Instantly; as quick as vapor.

Q. And if the vapor, if heavier than the atmosphere, has a tendency to settle and does settle on the ground, at what distance from the fluid could the vapor be ignited?

A. It will travel a long distance, kerosene oil that is 150 fire test, that is produced from crude petroleum after extracting the naphtha, gasoline.

Q. How is kerosene oil that is of 150 fire test produced from the crude petroleum?

A. After extracting the naphtha—gasoline—the 150-test oil comes off just below the lowest; it is called the lowest gravity, and the naphtha, the white oil, termed the heart of the oil.

Q. That is after you have taken all these highly inflammable fluids out?

A. Well, you can't take them all out. You can't exactly say. After you have taken out such amount as will have a gravity which the refiner knows will produce an oil that will stand 150 fire test, then he begins to take off his white oil.

Q. And that 150 fire test, as I understand it, means that you have got to apply heat up to 150 degrees Fahrenheit before it will ignite?

A. Before it will emit vapor enough to ignite.

Q. And even if the kerosene oil of 150 burned with a wick, the thing that burns is the vapor, isn't it?

A. Yes, sir.

Q. The fluid does not burn?

A. No, sir.

151 Q. So that this original spirit of petroleum which exists in the highest grade in the gasoline and then in the lower grade in the benzine still exists in a very low grade in the kerosene oil?

A. It is held in suspension, you might say.

Q. But it does not evolve until you get 150 degrees heat?

A. Not until it produces a flame.

Q. If you had an open vessel filled with gasoline, take an ordinary water pail filled with gasoline, standing in a room of ordinary temperature, at what distance from the pail would the fumes ignite if they were touched with a light, the fumes?

A. If a pail stood in this room and a lamp placed over in that corner, in any corner of the room, if the gasoline were put in the room and remained there any great length of time the gas would evaporate, fall over the pail, and follow along to the light and flash back and burn up the whole business.

Q. And suppose you had a pail filled with benzine, what would happen?

A. Well, the probabilities would not be so strong. It would take a longer time. It would depend upon its gravity. The smaller the space and the nearer the light the quicker would be the combustion; in either case what would ignite is the vapor thrown off from the fluid.

Q. Now take a pail of kerosene oil of 150 degrees in the same place, would there be any danger?

A. Not a particle.

Q. Why not?

A. Because the petroleum wouldn't emit vapor sufficient to be ignited unless the temperature of the room were raised above 150, and then it wouldn't follow any distance from the pail; you

152 would have to be very close to it to get any fire.

(The same hypothetical question was put to the witness as was

put to the witness Parsons, and the witness answered: I should say it was the spirit of petroleum, either gasoline, benzine, or naphtha.)

Q. Would you say it was kerosene oil?
A. No, sir.
Q. Were you in 1879 familiar with these naphtha or benzine or gasoline torches?
A. Somewhat.
Q. Were they an article of commerce?
A. Yes, sir.
Q. And how were they made?
A. They were made by a cylinder or half cylinder, half globe, and a pipe running down from the globe, bent, with a stop between the bend and the burner or in some part of the pipe and a burner on the end, with a little cup below. This burner was perforated with holes.
Q. And in use how were they lighted?
A. Those that I have seen you turned on the cock and a little of the fluid would run down into this cup, or in some instances the fluid was poured into the cup before turning it on, as a matter of convenience; that was lighted and after sufficient heat had been communicated to the burner to make it hot enough to produce the gas to the point where it would burn up quickly the flame would pour down, and by that time the amount in the cup would be expected to be used up.
Q. The object of the quantity of fluid in the cup was to heat up the burner so as to——

Objected to.

Q. The thing that burns there is the gas evolved after the
152½ fluid in the cup has been heated and that has heated the little end of the torch that you speak of?
A. Well, that is one purpose. If you will allow me to explain: If there was no flame there the fluid would continue to run out, and you wouldn't get any light, but the moment that the fluid touches a point near the burner it is transformed immediately into such gas that it will continue to burn and continues thereafter by the heat generated.
Q. The fluid has been burned up?
A. The fluid in the little cup.
Q. The fluid in the little cup has been burned up in the act of lighting?
A. That is it.
Q. And the subsequent flame is produced by the contact of the fluid with the heated flame?
A. Well, the whole burner is heated.
Q. You don't mean the tank?
A. Oh, no; I mean the point of ignition.
Q. You mean the little burner above the cup?
A. Yes, sir.
Q. There is no wick?

A. No, sir.
Q. Kerosene oil is not burned in those torches?
A. It was not at that time.
Q. And why couldn't it be burned?
A. Because with the lamps that were constructed at that time you could not get sufficient heat in the burner to heat the oil and keep it hot enough to make it into gas.
Q. To turn it into gas?
A. To turn it into gas.

Q. Well, since that—since 1879—have torches been made
153 so as to burn kerosene in them?

A. Quite recently they have been.
Q. But at that time they were not?
A. No, sir.
Q. If you burned such a torch as that in the open air would that fact have any effect upon the flame of the gasoline or benzine torch? Could you burn those torches in the open air with benzine in them?
A. Yes, sir.
Q. Or gasoline?
A. Yes, sir.
Q. Could you with kerosene?
A. No, sir.
Q. Why not?
A. Because you could not get heat enough there to generate gas to keep the flame. It would go right out immediately, and the oil would flow right out and gum all up. You might get a flame for a moment, perhaps, but not practically.
Q. Take the case of a torch constructed as you have described, with the fluid flowing down from the little reservoir, released by a cock, into the little cup, then lighted and the fluid dropping down in flame—a white flame—in the act of lighting, throwing up a large flame above, coming down then into a steady, permanent flame. What would you say was the fluid with which those torches were filled?
A. I would say it was the spirit of petroleum.
Q. Either gasoline or benzine?
A. Either gasoline or benzine.
Q. Would benzine act in that way?
A. No, sir.
Q. Suppose you had kerosene oil in a torch of that description in the open air or exposed.

A. Well, it would simply ooze right out of the burner; and,
154 unless there had been an intense heat applied, by which you get a flame for a moment, you get no light—you get no practical result.

Cross-examination by plaintiffs' counsel:

Q. Did you ever deal in these torches?
A. No, sir.
Q. Ever experiment with them?

A. Yes, sir.
Q. When?
A. Oh, various times since I first saw them.
Q. How many years ago?
A. I couldn't say at this moment.
Q. Well, about?
A. Well, soon after the introduction of petroleum people began to experiment with lamps, and one after the other would be brought to me to pass upon them.
Q. About what year?
A. Between 1866 and 1879.
Q. Assuming the question that has been put to you, and it was a hot summer's day, in the month of August, where the sun beats upon the roof from 12 o'clock m. to 7 o'clock p. m., how long do you think it would take for that article to ignite, whatever it was?
A. Under the conditions that have been named?
Q. Yes; assuming it was benzine.
A. Well, I think by the time you got that stuff poured out there would be vapor enough generated to ignite immediately; it might be possible for it to ignite two minutes after, and the conditions of the atmosphere might be such that it would take a little longer.

RUSSELL V. BURKE testified:

155 I am engaged in the refining of paraffine oils at the present time in connection with the Queens County Oil Works at Newton creek. I have been engaged in the refining of burning oils and this since 1861. I consider myself fairly familiar with the fluid products of petroleum and the qualities of gasoline and benzine. I term naphtha or gasoline and benzine inflammable products.

The same hypothetical question was put to this witness as was put to the witnesses Parsons and Holly, and the witness answered: I should say it was one of the light products of petroleum, either gasoline or benzine or naphtha.

Q. Would you say it could by possibility have been kerosene oil?
A. I cannot conceive of any circumstance that would cause 150 burning oil to explode or ignite. The reason why I think on this state of facts that the fluid which caused the fire was gasoline or benzine or naphtha and not kerosene oil is that the gas or inflammable vapor from the lighter distillates of petroleum, which are naphtha and benzine, runs along the ground and ignites. Well, a long distance away it will light, and it is followed by a blue flame and then a flash. Practically we don't consider there is any danger of kerosene oil of 150 giving off any fume. I should not hesitate to be in the room where they were drawing 150 burning oil with a lamp.

On cross-examination he testified:

Q. If this were benzine or gasoline how long, in your judgment, would it be before it would ignite, recollecting the lantern
156 moving, the pouring into a pail, and coming within two feet or eighteen inches of the barrel, and then pouring it in a can, and the lantern had perforated holes?

A. I should be prepared to see it in a half a minute, or I should think it would be very singular if it didn't explode within five minutes. There might be some variations—for instance, the movement of the oil in the room. I could not give any definite time. I would not like to go in there at all. The men in there might get out, and if the man that was farthest in didn't get burned at all I should say it was a miracle.

On redirect examination the witness testified:

Q. You wouldn't undertake to fix any exact period of time in which fire would occur under those circumstances?
A. Impossible to fix it.

GEORGE M. SAYBOLD testified:

I have charge of the inspection department of the Standard Oil Company. I have been familiar with the products of petroleum and with petroleum for fifteen or sixteen years. As inspector I have charge of the examination of products with regard to quality, inflammability, and so I am somewhat familiar with gasoline and benzine. Kerosene of 150 degrees fire test will not give off any fumes or vapor at ordinary temperature. Benzine, gasoline, and naphtha would give off inflammable vapors at zero and below. If there was
157 a pail of gasoline or benzine in this room, ordinary temperature, it would come freely from the pail, while from the kerosene, 150 water white, practically no vapor. If there was a lighted match put into kerosene oil at 150 it would extinguish the match. In approaching a pail filled with gasoline or benzine I should want it on a very long pole, I tell you.

The hypothetical question put to the witnesses Parsons, Holly, and Burke was put to this witness, and he answered: I believe that would happen from the spirit of petroleum, naphtha, benzine, or gasoline. It would not happen from kerosene oil 150 fire test.

Q. In regard to these gasoline and benzine torches in 1879, do you know anything as to whether kerosene oil could be burned in those?
A. From my experience I feel positively assured that there was no torch in 1879 that could burn——

By Mr. SMITH:

Q. You are positively sure?
A. Yes, sir.

By Mr. BUTLER:

Q. Why couldn't they burn kerosene?
A. Because the mechanical contrivance was not in existence to burn kerosene oil in that shape at that time.
Q. What was the mechanical contrivance in those torches?
A. Well, it was a reservoir of some kind or other put two feet, probably, sometimes more or less, above the burner, a small pipe

leading down bent in L shape, a burner on the other end, and stop-cocks, one for the inlet of oil, so-called naphtha or gasoline, and the other stop-cock for the outlet of the gas.

Q. Was this gas generated from the fluid?

A. The vapor, yes, generated from the fluid.

Q. That came into the cup and was lighted?

158 A. Well, it was necessary to let a small quantity into this cup underneath the burner so as to overheat the metal sufficient to generate the vapor in the naphtha that was let into the burner.

Q. Then the steady flame came from what had been let into the burner?

A. After there was sufficient heat generated that heat continued to generate heat from the gasoline or benzine as fast as it was needed.

Q. Could kerosene oil have been used in a torch of that description?

A. No, sir; not successfully.

Q. Assuming a man in the act of lighting it in the little cup that you have described and a flame falling to the ground, what should you say was used in that torch?

A. Naphtha or gasoline.

On cross-examination he testified:

If the fluid drawn was kerosene the occurrence could not have happened. It would have been safe in the oil-room as described to me.

Q. From the experience you have had under the state of facts assumed how long do you say it would have been before the article would have ignited?

A. It depends on so many different conditions that there is no man living could answer that question.

The defendants' counsel then read a portion of the testimony of Charles Godfrey Gunther, the original plaintiff in this action,

159 whose testimony was read from the stenographer's minutes of November 15th, 1881, as follows:

"Q. What took place on the 15th August, as far as you know?

"A. It was about dusk, and I was seated on the piazza of the building proper in sight of the pavilion and the gas-house underneath. I saw some parties with pails and a light. There were some children playing. Mr. Lanier Walker was playing with some boys around some small trees that I had planted in the lot, and my attention was attracted by their hollering, and I immediately looked back again, and I saw the men come out as though they were afire, and it did not occur to me that there was fire in the oil-room, although I saw it. I saw these men, and I ran out and said, 'Roll in the grass.' It was pretty high grass and has not been cut in front of that part of the house, and one struck a bee-line for the water, and the other one the fire was thrashed out by a crowd that I saw there, and in another instant I saw the oil-room burning, and the wind was from

the southwest—blowing not a gale, but blowing very hard and blowing right over the kitchen, and we had the only earthly chance of getting water in order to subdue the fire. There were two pumps right in the way—that is, in the kitchen, and the smoke and fire came from there, and immediately the pavilion caught, and I started out then, and I said to my wife, 'Get what you can and get out of this building; nothing will save it;' and Mr. Purcell and other gentlemen were on the piazza at the time, and they all ran in and got their things and came out, and I went back a second time, and I think I was the only one that went back a second time that came out again, and it was as much as I could do to keep others
160 from going in, and there were a good many parties that wanted to get into their rooms, and I advised them not to go; as it was, two men and two women lost their lives by attempting to go into their rooms; and the building in one hour's time or less than that was level with the ground."

STEPHEN MORRIS testified:

I was on the pavilion of the Locust Grove Hotel in the summer of 1879; had a clam stand on the dock and in partners with Walker. I started business as soon as the boats were running and the season opened. I was there at the time of the fire. I was on the pavilion evenings. I saw torches burning there.

Q. Where were the torches that you saw lighted?

Objected to by plaintiffs as immaterial, irrelevant, and incompetent. The court overruled the objection, and the plaintiffs excepted.

A. Around the music stand.

Q. Take those in front of the music stand. I want you to tell the jury what you know about the lighting of those torches.

The same objection; the same ruling and exception.

A. I saw the man down there, Mr. Stehlein, lighting them; he lighted them with a match; turned the tube off and struck a match and lit them with a match. After they were lit I saw flames dripping down.

161 On cross-examination he testified:

I am a son of William H. Morris, the witness who was examined as a witness yesterday. He got clams for me.

Q. How many times did you see Stehlein light those torches as you say?

A. When I was working at the hotel up there.

Q. In 1879?

A. Oh, in 1879.

By the COURT:

Q. Did you so state that you saw them in 1879?

A. No, sir; I didn't. I did net see Stehlein light them in 1879; it was in 1878. In 1878 I saw those torches around on the pavilion, and even put the light out with my foot, too.

Q. Where did the gasoline that you speak of come from?
A. I went with the book-keeper, Charles Brower, to New York. I don't know; couldn't say. I don't know whether it was on the east or west side or whether it was above or below Canal street. I don't know whether it was at the Battery or Harlem. I saw these lighted torches in 1879. It was about three weeks or a month before the fire. I am as positive of that as anything I have testified to.

By the COURT:

Q. You are positive that you saw these torches in 1879?
A. Yes, sir.

Defendants rest.

162 BERNET COSGROVE, a witness for plaintiffs, testified:

My business is that of cooper and cask dealer. I have been in business forty years. I know Lefferts G. Wilkin; he is in the oil business; his place of business is 8 or 9 Cedar street, near Pearl street. I sold him (referring to his book) an empty half barrel on the 13th of August, 1879. They run about 22 or 23 up to 32 gallons. I sold it or my son; I couldn't say whether I sold it. I recollect selling myself half barrels to Wilkin. They were painted all over blue; they run uniformly blue all over; that is the style we have for that class of barrels; for that particular line of business they are blue.

On cross-examination he testified:

I don't recollect whether I was in my place of business on the 13th of August, 1879. I couldn't say I have any recollection of seeing Mr. Wilkin on that day.

HARRY ROGENCAMP testified:

My business is that of truckman. In 1879 I was working at Locust Grove. Prior to that time I was working at my trade of stone-cutter. I had been at work at the Brooklyn, Bath and Coney Island railroad. At the time I was at Locust Grove, in 1879, Mr. Walker had charge of the hotel. I knew him and Hennessy and all of them. At that time I worked for Mr. Gunther and at
163 times for Mr. Walker. I did all kinds of work. I did carpenter work—taking lines on the dock, attending to the lamps on the dock for Mr. Gunther, and I looked after his interests. I knew Schuschardt; he had a rifle range there, watchman, took charge of the lamps, bowling-alley, and billiards. I recollect seeing a barrel there on the 14th of August, the day before the fire. I only saw one barrel; it was outside; it was painted as an ordinary kerosene barrel—white heads and blue sides. I helped Schuschardt put it in the oil-room; I tapped it inside the oil-room; I bored a hole and drove an iron pipe and Schuschardt made a plug for it; I lent him my knife to do it; he wanted to borrow my bit that he had bored it with before. How I came to bore it—he had borrowed my bit before to tap a barrel of oil and come to ask me if I wouldn't lend him the bit again; I bored it and Schuschardt didn't; I lent

him my knife to make a plug for the gas-pipe. Shelley was not present; I know where he was—he was laying under the shed in the hay, drunk: that was often his condition. In rolling it in we had to up-end it in. When I first saw the barrel it was on the grass plot in front of the hotel; that was in the evening of the 13th. The next day I saw the barrel, when Schuschardt called to give him a hand with it in front of the oil-room door; that was about three o'clock; it was marked 150 fire test. I was frequently in the oil-room for putty and oil for paints and brushes I lit the lamps on the docks; that was my business. I kept the oil that lit those lamps in the oil-room. I was in the oil-room on the 14th inst., the day before the fire. On the 15th I was in the oil-room; I
164 went in to get oil from Schuschardt out of that barrel, knowing he had a fresh barrel—to get what oil he had used for me. He was using Gunther's oil, and I wanted to get that back again, so I went in for a canful. Mr. Gunther used kerosene oil; occasionally he would get a can of Pratt's Astral oil, and on this particular day I recollect getting it of Schuschardt. There was on that occasion in the oil-room a couple of empty barrels, and there was a couple of half barrels—that is, a barrel sawed in half; they were used to set the full barrels on; and then underneath in this half barrel water was kept to put brushes in to keep them soft. These half barrels acted as stanchions for this barrel. I lifted it up and put it in there; there was no half barrel there.

Q. Did you ever see a half barrel there?

A. Never. I saw an experiment tried there with a torch. It was right on the side of the pavilion facing the railroad track as you came from the dock. (The witness designates the place on the diagram.) Schuschardt was there. It was daytime. It was about two weeks before the fire. Schuschardt tried to burn in the torch kerosene oil. It didn't prove satisfactory, but he tried it afterward and it proved satisfactory. It leaked. Mr. Gunther came along. I took some of the torches to Miller & Eastmead at Mr. Gunther's direction. I took them in the hotel wagen. I am pretty sure it was Mr. Gunther's direction. I recollect the man to whom I delivered them. He was in court at last trial. There were eight or nine of them. I took to Miller & Eastmead five or six of them. I couldn't place the exact figure; it is so long ago. I was on the pavilion during
165 the months of July and August, 1879, maybe every half an hour running around the pavilion. I have lighted up there many times. I never saw a torch hanging up on there, I am positive. There were of those torches about nine.

Q. Do you know what became of the balance of those torches after you took the number to Miller & Eastmead?

A. Schuschardt had some at his house. I saw them there. Schuschardt's house was about ten minutes' walk from the Locust Grove Hotel. Schuschardt had a cobbler's shop. He kept candies in his window and cigars and the like. I was there the whole summer. I remember the time the fire took place. I must have been in the oil-room fifteen or twenty minutes before the fire. I am very familiar with the oil-room. Its size was about eight or

nine feet wide and about twelve feet in length. The floor consisted of spruce boards inch and a quarter thick, and the sides were tongued and grooved. I had to stoop to go in the door, and that wasn't wide enough to roll a barrel in. There was another door, but that was kept locked. Mr. Gunther kept a yacht and steamboat. I heard Mr. Morris testify. I saw him point out where he put the barrel in. He could not get in that way because there was the bowling-alley, rifle range, and billiard-room. The door was nailed up. I have not been employed by Mr. Gunther since 1882. When the fire took place I had just finished filling one lamp and lit it just so that when it got dark I could come back and turn it up. I then saw a man on blaze. It was not dark. There was plenty of light—
bright light. Morris took lines on the dock. He had nothing
166 to do with lighting the lamps. I recollect the club-house and
the fence. That was down at the end of the dock. That was painted in 1878. I am positive of that. It was not painted in 1879, neither the fence nor the club-house. The pavilion was not lighted on the day it took fire. I am positive of that.

On cross-examination he testified:

I have been a good many times here. I don't know whether the question when the club-house was painted was put to me before or not. I guess it was. I kind of think it was on the last trial. I have painted the club-house three or four years before the fire.

Q. Do you recollect Morris ever painting it?

A. No, sir; never—yes, I do; in 1878.

Q. Are you sure of it?

A. Pretty near sure.

Q. Mr. Gunther says in his testimony that the time the fire broke out was about dusk. How does that correspond with your recollection?

A. Well, I know it wasn't dark.

Q. Mr. Gunther says it was about dusk. I ask you how that corresponds with your recollection?

A. Well, it was a little before.

Q. It was about dusk, wasn't it?

A. It was before it.

Q. Wasn't it about dusk?

A. About dusk. I saw Shelly on the 15th August, 1879, before breakfast, and I saw him late in the day lying drunk under the shed in the hay, pretty much all day. He was drunk the day before, too, and pretty much all the time.

167 WILLIAM H. FRICKIE testified:

I am a furrier. I have been such for about thirty years. I was a waiter in the restaurant at Locust Grove Hotel in 1879. I went there the 3rd day of July and remained there until the evening of the fire. I was on the pavilion every night and day. I am now in the fur business. The fur business is dull in summer. I know how the pavilion was lighted up. They had those railroad lamps. These were red and white lamps. These were lanterns, glass—common

kerosene lamps. I never saw any torches on the pavilion in 1879. I had occasion to look at the lights. I was not at the grove when the fire took place. I saw it. I was on the train. I left the grove to go to the city to the armory. I belonged to the militia at the time, and I had to be there at a certain hour. We got within a minute or two from Bath station as we saw the fire; but I did not know it was the grove that I left just about five minutes before the fire broke out. As near as I can fix the time, it must have been about twenty minutes past seven, because the trains ran on twenty minutes head time, if I am not mistaken. It was just about between dark and daylight. I could see distinctly. I know George Sumner. The two Sumners are brothers. George Sumner has been working at the hotel for three summers off and on, but not steady; sent off and come back and so on. He wasn't steady like a good many. I — never been discharged. I had a conversation with George Sumner. The first time I met him it was on the boat coming over from New York. I did not know about any trial or any suit
168 that was brought in the court. I asked him how he was getting along. He said, "I am getting three dollars a day from the insurance company;" and he said "besides that I got a new suit of clothes," and he said to me, "Wouldn't you just as leave testify for the insurance company as for Gunther, because he wouldn't pay you nothing," he said. "Well," I said, "with regard to the payment, if I am subpœnaed, I have to testify what I know." "Well," he said, "you are a fool." Then I got subpœnaed by the insurance company and I came up, and I was directed to come to some place on Court street—some lawyer's office—Lansing was the name. I saw Sumner right around the corner from this street here, and about the same conversation took place.

GEORGE LANE testified:

I am a photographer; was such in 1879; had a place of business in the summer of that year at the Locust Grove Hotel, at the left of the entrance, right at the corner of the pavilion. My office was on the side of the hotel, away from the shore, about twenty-five feet from the stable; this was about 150 or 175 feet from the kitchen. I had occasion in the course of my business to go to the kitchen very often to get warm water, and I would go in there to rinse out my silver solution dish. My business required me to get warm water, and I went to the kitchen for it. On August 14th, 1879, the day before the fire, on my way to the kitchen, I think, I saw a barrel of kerosene oil. I saw that barrel of kerosene oil standing between the entrance to the kitchen and the pavilion,
169 right near the fence; there was a little space inside the fence. I passed as near as ten or fifteen feet to it. It was a regular kerosene-oil barrel, a full-sized barrel. I think it was new; it was painted new, anyhow. It was in the morning when I first saw it. I went there in the morning, before I commenced business, to get some water. I saw it when I came out again. I did not see any half barrel or keg. There was no half barrel or keg there marked benzine. When I came out I saw kerosene there, and it reminded

me that I needed some for my business, and I looked at it pretty close, and after that I went down into the oil-room to get some. I did not see any half barrel or package marked benzine there. I was frequently on the pavilion that summer, sometimes fifty times a day; have heard the description given of the torches. I have seen such a torch; there is one in the court-room, I think.

Q. Were there any such torches as that, or anything like that, used on the pavilion that summer?

A. No, sir. I know Michael J. Hennessy, who was bar-keeper at the hotel; met him in Philadelphia, where he was painting a sign, "Hub Punch," on a fence at Broad and Market streets, in December, 1880. He told me on that occasion that John Walker was to get $1,000 from the insurance people, and that he was to get $200, besides board, and that Walker was keeping him to testify in this case. He told me how he slipped away from Walker's house by paying the servant girl twenty-five cents to get away his valise without anybody knowing anything about it.

On cross-examination he testified:

170 I think I was on the pavilion four nights out of the seven every week. I was all over the pavilion; would sometimes go to the bar eight or ten times a day and take a drink.

Q. What would enable you to see straight about your photographing?

A. You have to have something to steady you. When I met Hennessy in Philadelphia I spoke to him in a casual way; asked him what he was doing there. I said considerable to him. I don't remember it all. Conversation turned on Walker. We talked about different things and went and had a glass of beer together. We walked down to Ninth street and Vine street, and around through Philadelphia. I don't remember exactly what was said. Talked about the times at Locust Grove and what happened there. Told me he stayed with Walker all winter—pretty near all winter—from the time of the fire, and he told me how he left him. Walker and he used to go to New York together on sprees, and that Walker used to go and pawn his watch and go and play faro; and he said Walker would go around, and sometimes Walker would leave him and would not take him with him, and he had a very good time there; and he told me he left there one evening while Walker was away and got a girl to take his things out for him, and when he was going down to the station he met Walker and slipped him and got the train. Think we played a game of pool that evening. I asked him what Walker was keeping him there for, for nothing. He told me Walker was to get $1,000 from the insurance company, and that he was to get $200. Walker promised it to him. He thought that he never would get it—he had stayed there long enough; he had slipped away.

Q. Did he tell you why he thought he would never get it?

171 A. He told me Walker would spend it, or something of that kind.

Q. Now, what was something of that kind?

A. I suppose he meant gambling. He told me, anyway, that he never expected to get it from Walker, and he thought he had enough of him. He got a suit of clothes out of him. He told me he would not testify in this case. He said they wanted him to testify, and he was going to stay away from them.

Q. Who wanted him to testify?

A. I suppose the insurance people. Walker sent the detective for him. He told me he was not going to testify.

Q. What was Walker going to give him the $200 for?

A. This was after he left Walker; I think after he had given up the idea of testifying for $200.

Q. So that at that time Mr. Hennessy was not going to testify for $200?

A. I don't know whether he was or not. He told me that the detective came after him in Canada, and he said he slipped away from the detective. He had a good situation and he was making money, and he didn't want to go with him.

Q. Who did he say sent the detective?

A. The insurance company, I believe. I think that's what he said—between them and Walker.

Q. Now tell me exactly the language, or substantially the language, that Hennessy used to you when he told you about Walker's getting money and his having part of it; the whole thing.

A. He told me that Walker was to get $1,000 and that he promised him $200, and he said Thomas Shelly was to get some too; and he said the poor bugger would not get any, for
172 Walker would not pay him; and he said, "Walker, the son of a bitch, never gave me anything, and I left him." That is the express language that he used to me. Yes, he said that he was a notorious liar; that he didn't believe him. He ran him down in the worst way.

Q. Being on the pavilion fifty times a day, do you mean to swear positively that there was no such torches on that pavilion as have been described to you?

A. I saw one there once.

Q. Do you swear positively that there were none on that pavilion?

A. Not in use.

Q. All you say is you don't remember seeing them in use, is it?

A. I never did see them in use only when they tried one; one afternoon I saw them try one. I never saw them used.

On his redirect examination he testified:

Q. Who did you see try one?

A. I think it was Schuschardt, and I think Walker was there, and I think Mr. Gunther was there. I am not certain.

Q. Do you recollect what Mr. Gunther said on that occasion?

Objected to as immaterial; objection sustained; exception by plaintiffs.

THOMAS M. HEGEMAN testified:

173 I reside at Bath Beach, Long Island, and resided there in the summer of 1879. I have no particular business now, but at that time I was in the lumber business near Locust Grove. That was seven or eight hundred feet south. I was occasionally on the pavilion in the summer of 1879. I passed it every night and morning to and from my business and used occasionally to go on it. I occasionally noticed how it was lighted.

Q. Did you have occasion to notice how it was lighted?

A. No particular occasion; only sometimes I would be there in the evening and observe it. It was lit with lanterns and hanging lamps—railroad lamps and these lanterns enclosed in glass. I did not see any torches there. I was there after the fire was under headway. I observed it from my residence in Bath after it was burning and went there. I should say it was somewhere about half past seven when I first discovered the fire. It was, I suppose, daylight—twilight. There was no daylight then—that is, at the time I discovered it. I got there about ten minutes after I discovered it. When I got down there it all fell in in a very few minutes.

PALMER NICHOLAS CROPSEY testified:

My business is that of carpenter. I was a grocery clerk in 1879. I was at the Locust Grove Hotel two, three, and four times a week in the summer of 1879 before the fire. I did not notice particularly how it was lighted. I don't think I saw any torches; to the best of my knowledge I never saw any.

174 JOHN T. HINMAN testified:

I am a policeman at Coney Island and was a policeman in 1879. I knew Schuschardt, who was burned up at Locust Grove. He lived at Bath Beach. He had a candy store, tobacco store, and cigars, I guess. I know he had candies in there. He lived about half a mile from Locust Grove. I visited the pavilion at Locust Grove every day and about four or five nights a week. I know what a gasoline torch is. I have seen them at other places. I have seen what they call a gasoline torch in front of Furnell's, that he used to have in a tree. I don't remember ever seeing one on the pavilion at Locust Grove. I was at Coney Island when the fire broke out. That was about a mile and a quarter from Locust Grove. It was about dusk when I saw it.

On cross-examination he testified:

I know that Schuschardt's candy business was going on then. He had a little store on the right-hand side of the railroad track as you go to Bath. He had his candies and things in his window. I know he had candies and tobacco because I have bought them there myself in the summer of 1879. I cannot swear I bought any after the 4th of July. I may have done it after that.

EDMUND W. MORRIS testified:

I am in the fish business. I do not think I held any office
175 in 1879. I was town treasurer of the town of Gravesend in 1880. I have resided at Gravesend all my life. I know Joseph Stehlein, the witness that was called here. I have known him since about 1877 or 1878 up to the present time. I had a conversation with him upon the subject of the fire at Locust Grove pavilion. It was shortly after the fire, but I could not say whether it may be a week or ten days or twelve days or two weeks; somewhere about there.

Q. You told him some one had told you that they used gasoline or benzine. Do you recollect that?

A. Yes, sir; I brought that subject up in the way of conversation at my house. Stehlein was there.

Q. What did he say in answer to that inquiry?

A. He said it could not be gasoline because the lamps were broken and they could not use it, and when he was discharged that he turned it all out, for Mr. Gunther had kept it in a place in the hill in the sand and nobody could get to it but him, and he let it all run out. He did say when they were broken. I brought up the subject myself in conversation. He came to settle for some fish.

JOSEPH A. JACOBS testified:

I am a lawyer and am an attache of the marine court, New York city. I was at Locust Grove Hotel in the summer of 1879; was there five weeks; from the first week in July to the night of the fire. I noticed how the pavilion was lighted. The subject of the lighting of that hotel was particularly called to my attention
176 several times before the fire. The first time my attention was called to the manner of lighting it was the first week that we were there; the last, it was probably a week or two before the fire.

Q. Was the pavilion ever lighted by gasoline torches that summer?

A. No. I mean to swear positively that I was on the pavilion every night and never saw any gasoline torches or torches of the description called gasoline torches on the pavilion. I will swear positively that I was there every night and never saw any burning; that is all I mean to swear. I was there at the time of the fire; it took place about seven o'clock; it may have been a few minutes earlier or a few minutes later—about that time; it was light. I would hardly call it dusk. I was able to read without the use of a light. It was not after sundown.

CHARLES GODFREY GUNTHER, whose testimony was read from a former trial as follows:

I never authorized Mr. or Mrs. Walker or either of them or any of their employees to use gasoline, naphtha, or benzine in lighting the pavilion or any part of it or any part of the hotel in the summer of 1879. I never said before the fire to John Walker anything

about borrowing any sort of burning material for any place. I recollect I found fault with the light he had, and recollect speaking to Walker on the subject of lighting the platform. I never did say to Hennessy, "For God's sake, Hennessy, go and tell Walker to shut up about there being benzine in the building; if it is known it
177 will affect my insurance." I made a general remark on one or two occasions that he didn't light up the premises as he ought to with the facilities he had, and that the lamps were not trimmed. I found the same fault that the guests of the house did—that they should have better light and more properly lighted. Then I volunteered to get some additional lights, which I got. The above remarks were made by me on the pavilion; there were a number around. I ordered three dozen illuminating lights—lights such as they use on railroads. Those three dozen lights; kept six for use at the depot. I bought them on the 31st of July. They were immediately put up in the pavilion on the water front.

Q. Did you ever say in the presence of Hennessy that torches should be used there?

A. I never did.

Q. Were any torches ever put up to your knowledge?

A. Never.

Q. At the time you made a remark, there not being light enough, did you advise the putting up the torches?

A. Never. I never made the remark to Hennessy why he did not get out these torches that were in the laundry and have them lit. Hennessy did not say that he would attend to it in the morning, for I never exacted anything of the kind or gave any directions in relation to the performance of his duty on the pavilion. I never told him to get the torches out of the laundry. I never asked why he did not get them out and have them burned.

Q. Do you recollect who were present at this conversation
178 in regard to light, in which you say you said that you would get some lanterns, and subsequently sent the portion of the three dozen that you bought?

A. I think it was on the occasion when I came on the platform and found them endeavoring to light a torch. They were the ones that complained of the light. I came off the dock and found they had one of those torches that they had hauled out of the kitchen. Well, I asked them what they were doing there. He said that Mr. Walker insisted on having those torches burned, and that other people burned them and he didn't see why he couldn't; and I said, "You can't make those torches a success unless you burn naphtha or benzine in them, and I won't have it on the platform. If you can get those torches altered, so that they will burn kerosene oil and not — spilling all over, as this light does, you can have it done." If he could get it so that it would burn kerosene without any slabbering, running down, and burning as it fell and making the smoke and smell that it did—if they could get them altered—I was willing it should be done; otherwise, I said, I would not have them on the platform at all. They were taken away. I never saw any other effort made with those torches. I never heard anything

more of them until after the fire, when everybody saw the four or five torches there. On that occasion I said I would get the new lanterns myself. These were kerosene-oil lights. I would not have naphtha or benzine on the place, and it was immediately following that I sent these lanterns that I spoke of and had some reflectors prepared for them, too. I never told George Sumner to put
179 any spittoons under any torches. I never knew of his doing so.

Q. Did you ever say anything to George Sumner about torches, telling him to take them over and get them fixed?

A. Never. I never gave him a card to Miller & Eastmead. I never told George Sumner that he should put spittoons under the torches, so they should not burn down the place or the pavilion. I heard about the picnic before the fire. It was to be in the grove, about thirty feet from the house. I heard of the picnic on the Saturday following. There was a store-room under the pavilion, where anchors and rope —; that was adjoining the oil-room. It was on the side nearest the water. Then came the oil-room.

Q. Do you recollect any occasion on a Sunday or on or about the 19th of December when, in the presence of George Gunther and Archibald Young, Jr., Hennessy was there?

A. Yes.

Q. Did Hennessy on that occasion say that Walker wanted him to swear that he heard you order benzine; that he was going to get a good stake and would divide with him, Hennessy; and did Hennessy on that occasion say that he wanted him to swear that he heard you order benzine; that he was going to get a good stake and would divide with him, Hennessy, if he would swear so on the trial of the insurance cases?

—. He did. Joseph Stehlein met me and my son George on Montague street on the 9th November last.

Q. Did he then say that Mr. Furman had been to see him to get him to testify in this case that he had seen benzine or gasoline burned on the pavilion, and did he then tell you that he didn't know what was burned there except kerosene?

180 A. He did. He didn't use the word kerosene. He said, "I didn't know what was burned in them lamps," making me believe that he was going to testify that there was no such thing. He said, "I didn't know what was burned in dem lamps. I lose eight dollars a day."

On cross-examination he testified:

The gasometer was discontinued after I ceased having jurisdiction over it. It was discontinued in the fall of 1878, at the end of the season. September 17th, 1878, was about the end of the season. The house generally kept open until October. I do not recollect applying for that privilege to keep not exceeding five barrels of kerosene. I think the surveyor must have come around. I never kept five barrels of kerosene oil on those premises. The torches were bought for the grove the year before; they were my property. I saw three persons go into the oil-room. I did not recognize any

of them. They were, I should judge, about 85 feet from where I was. They were about going into the oil-room. I noticed they had pails and a light. I could not make out exactly what kind of a light, whether it was a railroad lantern or an open lantern. It appeared to me like a railroad lantern. The fire broke out as soon after they went in that I had hardly time to reflect on the matter—about a minute and a half.

Q. Did you state at the coroner's inquest that the fire broke out a quarter before eight?

The plaintiff objected. The court overruled the objection, and the plaintiff excepted.

181 Answer. I think I said about a quarter; I could not tell exactly; I did not look at my watch.

On his redirect examination he testified:

Q. You said, in answer to a question that was asked you, that you were reading a paper in the piazza.

A. Yes. I had then left the dining-room some little while. I was reading the paper by daylight.

Recross-examination:

Q. Do you mean now on your direct examination to correct what you said, that there were three doors in the oil-room?

A. If I made an omission before, what I have stated now is correct.

Q. How many doors were there in the oil-room?

A. The oil-room has two entrances from the inside and one into the store-room.

Q. Then there were three doors?

A. There were three doors; what I always said.

Q. Things could be taken into the oil-room or out of the oil-room by either of those doors, couldn't they? You could carry an article in or out of the oil-room by either of those doors?

A. Yes; I suppose so.

AMELIA A. GUNTHER testified:

I am the widow of Charles Godfrey Gunther, deceased. He died on the 27th day of January, 1885. He had been formerly
182 mayor of the city of New York. Prior to his taking charge of the railroad he was a furrier in New York for many years, under the firm of C. G. Gunther's Sons—Christian G. Gunther's Sons. He had been in business twenty-five or thirty years under that firm. Afterwards he retired and became president of the Brooklyn, Bath & Coney Island railroad. I recollect distinctly the night of the fire at the Locust Grove pavilion. I was sitting on the right side of the piazza of the main house, not the pavilion. My daughter and Mr. Gunther were with me, and we were reading the evening papers.

Q. Were you attracted at all as to the night on that occasion? And, if so, state to the jury.

A. I only noticed it was a particularly beautiful, clear night. I could distinctly see everything around me. It was a beautiful sunset, and I could read the paper distinctly. The night was beautiful. While sitting there we were attracted towards the place. Perhaps I was the last to see the fire; I think my daughter first saw it. At that time I was reading the paper, and it was daylight.

On cross-examination the witness testified:

I am one of the plaintiffs in this suit. During all these twenty or thirty years my husband was actively engaged in business and a competent business man, and had a high position as such.

183 FREDERICK SUMNER testified:

I am engaged at the Brooklyn, Bath and West End railroad. It is the same Mr. Gunther had under a different name. I have been engaged there since 1876. I know the Locust Grove Hotel, or what they call the Locust Grove pavilion. I was there in 1876 when the pavilion was first built, helping the carpenters and doing general work; was then with Mr. Gunther. The bath-houses were about twelve feet from the pavilion. I was there in the summer of 1879, in the employ of Mr. Walker. I had charge of the bath-house. I recollect the oil-room. The sun commenced to shine on the oil-room about two or three o'clock, until sundown. I remember the floor of the oil-room. It was made of spruce plank, white, inch and a half—common spruce plank. The dining-room was under the main hotel. It was partly under the ground and partly above. It was about four or five feet under ground. There was a piazza over the window of the dining-room. I was in the oil-room the day of the fire. I think it was about five o'clock. I went there to fill my lamp for the bathing office. I saw in there a kerosene barrel. There were two barrels; one was empty. There was a little table about two feet square I used to trim wicks on. The barrels I saw were the usual color, painted blue, white head. There was no half barrel there. I saw Schuschardt there the day before the fire. I believe I had a key to the oil-room. I went in the oil-room every day to fill my lamps, and I did not at any time see any blue barrel there and blue head, or keg or half barrel. The barrel was on a half barrel,
a barrel cut in two, and sticks put in to hold the barrel on.
184 The last time I filled my lamps the barrel had a gas-pipe in
it with a small wooden plug. I was there at the time of the fire. It was not dark; it was more light than dark. I was in the dining-room with the waiters. There were kerosene lamps there. There were some lit, but you have to light them about a half an hour earlier than you would outside, because the dining-room was very dark evenings. There were no torches on the pavilion. I was on the pavilion every night through the summer. I have lighted the pavilion many a time. It might have been the night of the fire and might have been a week before I saw those torches in the laundry. I never saw one on the pavilion. They were lying right

in the corner of the laundry, on the floor, right behind the clothes mangle.

On cross-examination he testified:

When I went to the oil-room I went always for kerosene.
Q. You never went for benzine?
A. No, sir.

HENRY WELLINGTON testified:

I am a manufacturer of gasoline lamps and burners and kerosene goods. I have been in that business about twenty-five years in New York and Chicago. I manufacture torches of all descriptions. We have manufactured and probably patented a dozen prior to 1879.

Q. Have you seen a torch with a round fount or ball and a long stem two or three feet in length and a stop-cock attached to it?

185 A. Yes, sir. We can burn in such a torch kerosene or gasoline. I have seen such torches burn kerosene. Torches of that character have been made for forty years; what they call "English torch-burners." They burn kerosene, but not as satisfactorily as they will gasoline or turpentine. I know the fact that they were burning kerosene. The difference between the two is that while burning kerosene it will be dripping all the time and the unconsumed carbon will drop from the burner down to the floor, but in gasoline no carbon will drop at all; it would be all consumed.

On his cross-examination the witness testified:

Q. Do you mean to say that a torch such as you have described, with a small cup to hold the fluid and a plate above it, heated by the ignition of the fluid below, and would be throwing off gas, causing this flame, would be produced by burning kerosene?

A. That is not a gas; it is only the oil being rarefied; it is only a vapor, and it is not a gas until it is mixed in the mixing chamber. You are not burning gas; it is rarefied air—carbureted air. The ordinary torch sold in 1879 was for kerosene or gasoline.

Q. Wasn't it for burning gasoline?

A. Was sold for burning gasoline or kerosene; we do not discriminate.

Q. The ordinary gasoline torch sold in 1879 was adapted for burning gasoline, wasn't it?

A. Yes, sir.

Q. The ordinary gasoline torch sold in 1879 was adapted for burning either gasoline, naphtha, or benzine, wasn't it?

A. Yes; made for those purposes.

Q. In your trade you don't distinguish between gasoline,

186 naphtha, or benzine, you say?

A. No, sir; there is no difference.

Q. And in a torch of that description, a gasoline torch made in 1879, you could burn either fluid?

A. Yes, sir.

Q. Can you state any place where in 1879 a torch such as you

have described and sold as a gasoline torch was actually used for burning kerosene?

A. Outside our own factory I couldn't say anything about it. Inside of our own factory there was no difference in construction in regard to a torch made to burn gasoline or a torch made to burn kerosene.

On redirect examination he testified:

The torches I have described as burning gasoline will burn kerosene. I have tried them in our factory. We have sold altogether probably up to 1879 twenty thousand of them.

On recross-examination he testified:

I mean to say that in 1878 and 1879 we sold the same torches indiscriminately for gasoline and kerosene.

JAMES C. EASTMAN testified:

I am an oil-refiner, refiner of petroleum oils, and have been such continuously for twenty-five years.

To this witness the same hypothetical question was put as was put to the witnesses Parsons, Holly, and others on the part of the defendants, and the witness answered: "That would be a very hard question to answer."

187 Q. Could it have been benzine being there seven minutes and doing all this?

A. I should doubt its being benzine. There is a vapor from kerosene. If the barrel was tilted one side to get the fluid out of the barrel, as described, there would be a vapor which would ignite under certain circumstances. If it were benzine it would be apt to light immediately. I should think it would light before he got pouring it into the can. It is my opinion if it had been benzine it would have lighted immediately on handling that way.

On cross-examination the witness testified:

Benzine and gasoline are more inflammable than kerosene. The most inflammable of the fluid products under ordinary use is gasoline, and benzine is not quite so inflammable, but they are both inflammable and dangerous.

Q. Under ordinary conditions the fumes that are given off by benzine and gasoline are not given off by kerosene?

A. Yes, sir; they are given off, but not in such quantities. Take an open pail here in this court-room and fill it with gasoline or benzine it would give off vapor. It would ignite at a distance under certain conditions; it might ignite in pouring a pail full; it might ignite to the further end of this room; under other conditions it might not ignite, perhaps, four or five feet away. It would ignite as soon as the light struck the vapor. I mean to say that an ordinary pail filled with kerosene would give off vapor that would ignite at a distance.

Q. Under what conditions?

188 A. Under conditions that you had a light sufficiently large to give the heat sufficient to set the vapor on fire.

Q. Supposing it is kerosene of 150 fire test?

A. Well, 150 fire test will give off vapors that would ignite from a lantern burning or from a lamp burning at probably eighty or ninety degrees.

Q. If you lit a match you could approach the pail of kerosene oil and apply the light and it would put it out, wouldn't it?

A. Yes, sir.

Q. Whereas if you approached the pail of gasoline the moment the light came in contact with the vapor it would be on fire?

A. Yes, sir.

Q. If you had an open pail filled with refined kerosene oil in this room and you had a glass stable lantern with an ordinary light at a distance of three or four feet, would there be any danger?

A. I don't think there would, not if the pail stood there without agitating. The fire would have happened in the oil-room if it were benzine or gasoline. The explosive part does not necessarily indicate benzine or gasoline. A blue flame sometimes arises from kerosene. It would likely happen from gasoline or benzine.

Q. And it would have the appearance of being swept by a broom?

A. Yes, sir.

Q. So everything that happened would have happened if it was gasoline or benzine?

A. Yes, sir.

Q. The fact that the fluid was agitated is one of the things that makes you doubt but what it might have been kerosene oil?

A. Yes, sir.

189 Q. Because while the kerosene oil, unagitated, gives off a little vapor compared with gasoline and benzine, when you begin to agitate it violently the vapor would be increased. That is so?

A. Yes, sir.

Q. Then another reason why you say you might doubt whether it is gasoline or benzine is the length of time?

A. Yes, sir.

Q. That is quite important, is it not?

A. I should judge it was.

Q. The quicker it happened the more likely it would be to be gasoline or benzine?

A. Yes, sir.

Q. Now, suppose instead of being seven minutes or twelve minutes from the time that the man and the boys were seen to go in by a person sitting on the piazza of the hotel looking at them to the time they came out was only a minute and a half, it would then be more likely to have been benzine or gasoline than if the interval was from seven to twelve minutes?

A. I judge that it would.

Q. That makes quite a difference in the answer you give to the questions, doesn't it?

A. Yes, sir.

On his redirect examination he testified:

You are more apt to have an explosion when gasoline takes fire than you are from kerosene. The effect of that explosion would be pretty apt to destroy the building. I don't think the boy who fell between the barrels would get out alive. If it were benzine I should doubt if any of them would get out alive.

190 By the COURT:

Q. You spoke some time ago about temperature at the place of contact, I think?

A. Yes.

Q. Is not the temperature at the place of contact with a lighted match as high as 90 or 100 degrees always?

A. Let me explain, if the court will; perhaps I can make it more to your understanding. You might take a match and hold it over a small cup of oil—just above the oil in the vapor that was rising—and that match would burn long enough to create heat enough to set that vapor on fire, and the vapor on fire would create heat to set the oil on fire below it, whereas if you took the match and lighted it and immediately put it into the oil it would not be there sufficient length of time to set the vapor on fire—that is, in putting it directly into the oil it would be put out before the heat was sufficient. I could not do that with gasoline.

MICHAEL JACOBS testified:

I live in New York city; am a lawyer; was at Locust Grove in the summer of 1879; went there in the early part of July and was there up to the time of the fire. There were nine of us in our family. There were over seventy guests in the hotel; the house was full. I was on the pavilion every day and evening. I saw how it was lighted. I had my attention particularly called to the subject—how the house and pavilion were lighted. I have talked with the Walkers on the subject of how the pavilion was lighted two
191 or three times—the first time within two days after we came to the hotel and the last time a week before the fire. I know what a gasoline torch is—an instrument, with a reservoir or feeder to hold fluid, about six or eight inches in diameter, and a tube running down about two or three feet along, and then an elbow about a foot long, and at the place where the gas is to be burned a little cup with a stop-cock to turn on or off the fluid.

Q. Did you ever see any gasoline torches burned on that pavilion?

A. If you say torches, I did not. I saw one torch experimented with on only one occasion.

Q. Did you ever see any such torches to light the pavilion?

A. I did not. I did not see any torches on the pavilion except on this occasion when I saw the experiment tried.

Q. State how the pavilion was lighted.

A. Every other part of the pavilion had a square box—a reflector,

rather—with a kerosene lamp inside. Perhaps two weeks before the fire additional lights were brought there.

Q. They were put up between the posts?

A. They were those conductor's lanterns. They were put up the latter part of July. I recollect shortly before these lanterns were put up being present at an occasion when something was said as to a deficiency or lack of light on the pavilion. This conversation was on the pavilion. The conversation related to the subject of the insufficiency of lights on the pavilion. The experiment I spoke of—trying to light one of these torches—was tried just before dinner at the front part of the pavilion as you come up the side
192 stairs; the side nearest the railroad track—the south.

Q. State what you saw on that occasion.

A. Mr. Walker was experimenting with a light. It was a light at the first post going upstairs on the railroad side of the pavilion, and Mr. Gunther and I had been sitting some little distance off, and he came up and asked what he was doing—Mr. Gunther asked Mr. Walker what he was trying to do. He said he was trying to see whether this would burn. He (Gunther) says, "I don't want that burned. I don't want you to burn that; that never has been burned. I don't want you to be experimenting with it at all. I want you just to hang it up as it was." So he did. He (Walker) said he didn't have sufficient light. He wanted more light, and Mr. Gunther then brought out those conductor's lamps, and told him to put up some of them. They were enclosed in glass. On the afternoon of the fire I went to Coney Island. It was about five o'clock in the evening when I got there, and remained there until I saw the blaze. My attention was called to it just as I got through my dinner. I ate my dinner on the Coney Island pier, and I was reading my evening newspaper, The Telegram, and I saw a big blaze. I didn't know what it was, and I sat there probably some time. Some one told me it must be Locust Grove. I immediately hurried down to the depot. It was all ablaze. It must have been about seven o'clock.

GUSTAV BIERLIN testified:

193 I am a hotel-keeper. In 1879 I was a butcher. I reside at Bath. I supplied Walker at the Locust Grove Hotel in 1879 with meats, poultry, and provisions of all kinds. I was at the Locust Grove pavilion every day, more than once a day some days; sometimes twice; some days three times. Some weeks I was there every night and some weeks four or five nights out of the week. I remember the 14th day of August, 1879, the day before the fire. On the 14th of August I drove up there in the morning and backed my wagon up to the kitchen, where I always back up, and there was a barrel of oil lying in front of me, where I generally backed up, and I got off, pushed it out of the way—at least I didn't, but I had to push it one side so I could get my meat, and I left my breakfast meat there, and then I came back, I think, about ten or eleven o'clock, for the order for dinner. I did not see it then. I remember how that barrel was painted. It was a blue body with a white head, and 150 proof marked on the head of it. I saw only one. It was located right in

front of the kitchen door, about a distance of five feet—that is, from the fence door; then there was five feet distance again between the fence and the kitchen door, and I was five feet away, where there was a walk raised made of boards, raised about a foot, which made it convenient for me to get at my meat from the wagon, and I always stood on this walk, so I had it easier cutting in my wagon.

Q. If there had been a blue keg or half barrel on that occasion, was your attention so called to it that you would have seen it?

Objected to. The court sustained the objection, and the plaintiffs excepted.

Q. Did you see anything of a keg or half barrel on that
194 occasion?

A. I did not. I know what a gasoline torch is; I have seen them burning about in different places; there was no such torches lighted in this pavilion. I saw the one they tried to light, I think it was on Saturday before the fire, near the railroad track, fastened on a tree. The torch was a piece of pipe about eighteen inches above the bowl, I guess, and eighteen inches below the bowl, with an arm to it, and a burner on the end of the arm. I saw that Schuschardt was experimenting or trying to burn it. Mr. Gunther was not there. I never saw any such torch on the pavilion in 1879, burning there. I knew Schuschardt; he kept a cobbler's shop at Bath, near the station; he had a bench in his shop, and in the window he had a few knick-knacks—cigar boxes I saw, and candy. I saw torches, such as I have described, at Schuschardt's. As near as I can come to it, I think it was the Wednesday before the fire. I think there were four, five, or six.

On cross-examination he testified:

This place where the kerosene oil barrel was — the usual place of delivery of goods. I had seen several other packages, but they were not all delivered at the same place. That was the place of delivery of most of the things. The day before the time I saw the kerosene barrel I didn't see anything, nor the day before that. A day or two before that there was a couple hundred ears of corn there.

Q. There was nothing remarkable about the kerosene-oil barrel being there, was there?

195 A. There was; because it was in my way.

Q. Because it was in your way, that was the reason you noticed it?

A. Yes, sir.

Q. Now, can you tell how many days before that you had particularly noticed anything that was there?

A. I can, on some occasions, remember other things that were there.

Q. But you can't specify any day, can you?

A. No; not exactly the day. When I saw Schuschardt experimenting with that torch it was not on the pavilion; it was in a tree.

Q. Mr. Bierlin, if there was any experiment made by Mr. Walker

with one of these torches at the first post on the pavilion on the railroad side when Mr. Gunther was present, you didn't see it?

A. There was none made on the pavilion while I was there. I never saw any made on the pavilion. The torch was filled on the pavilion. Schuschardt then took it off and hung it on a tree.

HENRY M. HAVILAND testified:

My business is that of book-keeper. In 1879 I was with Miller & Eastmead, 192 Water street. The business of Miller & Eastmead were lantern manufacturers. I knew Mr. Fowler; he is dead; he was a salesman. Mr. Miller had charge of the manufacturing upstairs; he only came down when he was called. I remember the occasion of the delivery of five gasoline torches from Locust Grove Hotel. I recollect the man who delivered them. (Mr. Rogen-
196 kamp stood up, and the witness said: "That is the man, there is no question about that.") He brought them in his wagon. That is the only lot of torches that came from Locust Grove. Those torches were broken up. Mr. Gunther called, and under his direction they were broken up. After they were broken up they were thrown in a scrap barrel and sold for old material. I heard George Sumner testify on the other trial; that is the only time I ever saw him. I heard him testify about his delivering them. He was not the man that delivered them.

On cross-examination he testified:

All the torches I saw delivered were delivered by Rogenkamp. I took them in my hands. I will not swear whether he put them in my hands or Mr. Fowler's. We were both there at the time. I did not have anything to do with them until Mr. Gunther called. I sent them upstairs and left the order with Mr. Miller that Mr. Gunther would call and give directions what to do with them. I saw them after they were broken up. They lay around there. I suppose I counted them at the time. I should say there was five or six.

ROBERT GRIMSHAW testified:

I am a consulting engineer and scientific expert. I am familiar with the different fluids, the products of petroleum, and have been such fifteen years. My business has been very largely that of testing oils and materials for those who make and buy them. I
197 have tested them for the Standard Oil Company, the Vacuum Oil Company, and other large manufacturing companies. In the refining of crude oil there are a number of products that come over, and the exact boundary line between any two of those is not fixed by commercial custom or law. There is a kind of a general term that is used—for instance, benzine, gasoline, and naphtha. The first part that follows is regoline, which is not used in every-day life; then gasoline; then C. B., a naphtha; then kerosene, and lubricating oils. I have heard the various experts on this trial testify in answer to the questions put to them upon an assumed state of facts.

Q. Now, if a barrel was tipped over to get the oil, and a pailfull

was drawn from that, and that was discovered to be leaking, and then it was poured into another pail, and then poured into a can without any funnel, and during the time the light was taken from the sill and put close to the fluid that was drawn—this in a room ten or twelve feet square and seven high—what, in your opinion, would that fluid be?

A. That is a question that could not be answered; it might be any one of a hundred different fluids.

Q. What would have been the effect if it had been benzine?

A. The case is not supposable for the reason I don't think he would have got the first pail down. I don't think he would have got as far as the second pail. If the light had been as close as that, there would have been an explosion long before they got to the second pail. The effect would be to blow out the walls of the building. The three persons in there might have got out there alive,
198 but I wouldn't give much for the prospects of living long after.

Q. One of the boys testified that during the efforts to get out one of them was thrown between two barrels; that he got up and then went out. Do you think that — supposable case, under the circumstances, of his going out alive under those conditions?

A. Supposing that to be benzine he might have got blown in there and wedged in. He couldn't have been blown in and then blown out. The word kerosene is a very elastic expression; kerosene means almost anything from very close to benzine up to something that is very hard to set fire to. When marked "150 proof" it ought to indicate the quality; it should do so. In my experience a great deal of oil that is sold at 150 is really not 150; it will flash clear down to 100, and even 90. Sometimes the law is evaded by giving 150 fire test instead of flash test; 150 flash test is higher than 150 fire test, and oil may have a fire test of 150 and may flash below that. I have known kerosene fluid to ignite at 90, although the oil was nominally 110 to 120.

On cross-examination he testified:

I have seen kerosene oil of an actual fire test of 150 degrees give off vapor at ninety, but not at the present temperature of this room.

FREDERICK O. KETCHUM testified:

In 1879 I was in the oil business at No. 5 Cedar street. I was a member of the firm of Wilkin & Ketchum. I knew John
199 E. Walker, who was at the Locust Grove pavilion in 1879. He ordered of Mr. Wilkin some benzine and gave Mr. Wilkin directions as to the half barrel of benzine in my presence. He said he wanted a half barrel of benzine sent to Locust Grove. I saw the half barrel; it was painted blue all over. On the night of the fire I had a conversation with John E. Walker.

Q. Where were you when you first saw the fire at Locust Grove?

A. I was at New Utrecht village; that is about a mile and a half, I should judge, or two miles. It was between daylight and dark. I drove down to Bath and walked over to Locust Grove from Bath.

I saw Walker there. The fire was not out. I had a conversation with Walker in regard to benzine when I went there.

Q. What did Walker say to you about there being benzine on the premises?

Objected to as immaterial and irrelevant and occurring after the fire. The counsel for the plaintiffs stated that it was offered as a declaration of Walker in connection with the testimony given by the witness Morris on the part of the defendant, and also as a part of the *res gestæ*. The court sustained the objection, and the plaintiffs excepted.

On cross-examination he testified:

I think I was asked on the previous trial the color of this half barrel. I saw the half barrel; I saw it at Wilkin's store. I had an office with Mr. Wilkin. We were not in business together. I had nothing to do with the sale of this half barrel of benzine. I simply happen to overhear. I merely saw the half barrel casually and did not examine it. I was at the store when it was delivered. I saw the barrel of kerosene that was blue, with white head.

Q. You have seen barrels of benzine marked, haven't you?
A. Yes, sir.
Q. Ordinarily they would be marked benzine?
A. Yes, sir.
Q. That is quite common, isn't it?
A. Yes, sir.

By Mr. SMITH:

Q. But this one was not marked?
A. It was not marked.

By Mr. BUTLER:

Q. Do you say that you judged because kerosene barrels ordinarily are marked that this was marked, and if it is customary to mark half barrels of benzine and you say this was not marked, how do you reconcile that?
A. It is not customary; it is merely a matter of trade.
Q. It is sometimes done?
A. It is sometimes customary; yes, sir.

THOMAS PRICE testified:

I am a steamboat pilot. In the summer of 1879 I was captain and pilot of Mr. Gunther's boat named "Bay Ridge." I commenced with Mr. Gunther in the year 1876, when the pavilion was built. I was in Mr. Gunther's steam yacht. I was frequently on the pavilion. I was there sometimes when it was lighted up. I never saw gasoline torches there. I was on board of the Josephine when I first saw the

fire. I had left Locust Grove, going up the Narrows. The time
201 to leave there was 6.50; it may have been in the neighborhood of seven o'clock. We were in the pilot-house when we discovered the smoke; saw black smoke; we could not see fire.

CHARLES P. BATEMAN testified:

I am a blacksmith; I live at New Utrecht. In the summer of 1879 I visited Locost Grove pavilion, in the evening, three or four times during the week. It was lighted by what they called railroad lanterns. I know what is known as a gasoline torch. I have seen them in many places on the island. I never saw any torches on the Locust Grove pavilion in the summer of 1879. I was about a quarter of a mile from the pavilion when the fire took place. I was in my father's barn greasing my father's carriage. I had no light there. It was between sunset—twilight—not quite dark enough to light a light yet. When my attention was called to the fire the centre of the pavilion was all in a blaze. I went there; it took me about five minutes to get there.

GEORGE A. GUNTHER testified:

I am one of the plaintiffs in this action and son of the late Charles Godfrey Gunther and one of his executors. My mother is executrix. In the summer of 1879 I was superintendent of the railroad and general manager. I knew the man called Schuschardt. He lived at Bath, near Benson's Corner. He was a boot-maker, and I
202 believe he had a little business—cigars. The place was about half a mile from the Locust Grove Hotel. I had been on the pavilion there several times in the summer of 1879, but not often. I have seen torches they call gasoline torches. I never saw one at any time lighted on the pavilion. I have seen them lighted in the grove; that was in 1876 and 1877. I was not there at all in 1878—that is, nights. I know Michael J. Hennessy. He called on me on a Sunday; I cannot fix the dates. At one of the first trials I had the facts in my diary, taken immediately after the conversation. The diary is not in existence. I stated definitely then, and that was correct. If I stated at the last trial it was read to me from the trial before. I couldn't remember; I think it was in December, 1880. When Hennessy called at my house my father was there and Archie Young, Jr., my brother-in-law. Hennessy stated to my father that Walker wanted him to swear on the trial in the suit between Gunther and the insurance company that he had heard Gunther order benzine. He said on the same occasion that Walker was going to get a good stake and he would divide with him. I can't say the sum he was to get; he was to get something, and Walker was to get a thousand dollars. I know Joseph Stehlein. I saw him after the fire in Montague street. We were walking down a street and we saw him, and my father wanted to know what Joe was here for. Father never spoke to Joe at that time, and I was on friendly terms with him, so I called him over and I spoke to him. He said he had a subpœna to come and tell what he knew about those gasoline

torches, or substantially that. I can't say exactly what he said. I said you know what was burned in them. He said, I don't
203 know what was burned in them. He said he didn't know. I know that I asked him out and out whether he knew what was burned in them, and he said he didn't know. I recollect where the gas-house was. I recollect where the dining-room was. There was a piazza over the windows. There were about four acres, including the hotel and the property there. The whole plot contained twelve acres. There were thirty or forty trees. I never heard anything about benzine being burned there till after the fire.

SAMUEL W. FOWLER, who having died, his testimony was read from the minutes of a former trial:

I was employed by Miller & Eastmead in the capacity of a salesman, sales clerk, and shipping clerk in 1879. I am in the same business now with them. They were lantern manufacturers. There were delivered in 1879 from the Locust Grove Hotel some five or six torches; I am sure five. They were gasoline torches. They were broken up. Mr. Gunther directed them to be broken up and destroyed. I saw the man who delivered them. I received them. I saw the man who was examined here by the name of George Sumner. He was not the man who delivered them. I am very positive of it. The man who delivered them was a man employed by Mr. Gunther, and drove his wagon or cart. He drove them alone in a wagon, and jumped out and brought them in. I knew the man very well or did at the time. He used to come there to buy goods for Mr. Gunther on the railroad and take them away, and I became familiar with his countenance. I never saw that man Sumner in any connection with those torches, and I never had anything to do with him.

204 CHARLES NEVILLE CROZIER testified:

I am the almoner of the St. George Society of New York. I resided, in the summer of 1879, at Unionville, near Locust Grove. During the months of July and August I was frequently in the Locust Grove pavilion. I was very well acquainted with the late Mr. Gunther. I saw lights there. I did not see any torches; I saw colored lanterns. When the fire took place at the Locust Grove pavilion I was just coming in with my boat. I was on the piazza of my cottage, and one of the fishermen on the beach told me the pavilion was on fire, so I went up there, having friends at the hotel. I could get there in three or four minutes. When I arrived there it seemed to be in full blaze. It certainly was more light than dark.

CHARLES A. MORRIS testified:

I am a clerk in the employ of the board of health of the town of Gravesend. In July and August, 1879, I was ticket agent of the railroad and was frequently on the pavilion at all times till as late as nine

or ten o'clock every night. I had occasion to see what lights were there. There were no gasoline torches—none that I could see. I know what gasoline torches are; have seen them burn at other places. At the time of the fire at Locust Grove I was on my way to Coney Island from the pavilion. I was on the train. It was shortly after seven o'clock. I don't know how light that was.

205 ANDREW G. CROPSEY testified:

I am a lawyer by profession; school commissioner by occupation, of Kings county. I was justice of the peace in 1879. I was justice of the peace, from the beginning of 1874 until the close of 1882, of the town of New Utrecht. I was the nearest justice of the peace to Locust Grove. As such justice I was *ex officio* coroner in certain cases. I acted as coroner during the inquest held over the bodies that were burned at the Locust Grove fire. I knew Mr. Gunther, the former plaintiff in this action; never employed by him in any way. I knew Michael J. Hennessy. He was sworn on the inquest, and I reduced his testimony to writing.

Q. Do you recollect his testifying before you in these words: "I will swear that Walker had no gasoline about the premises, nor did he have any lamps for its use?"

A. He did so testify and I reduced it to writing.

Plaintiffs' counsel concedes that the testimony was never signed by Hennessy.

Jacob Constine was also sworn before me, as coroner, as a witness on that occasion. I reduced his testimony to writing. It was read to him and he signed it. He was sworn before he signed it in the regular way. All the witnesses were sworn before they were examined that they would true answers make to all questions put to them; Marmion also. I understood his name to be Marion. He is the same young man that was here.

The counsel for the defendant stated that no question is made as to the testimony of Constine or Marmion as taken at the in-
206 quest and reduced to writing by the coroner and signed by them with their name or mark.

His deposition was then read in evidence, and is as follows:

JAMES MARION, being duly sworn and examined, testifies:

I reside at No. 188 Amity street, in the city of Brooklyn, with Mr. Pier. I have worked at Bath Park since 4th July last. I recollect the fire at Locust Grove; was there. I went there with Constine. The cashier of Bath Park in my presence told Constine to go to Furnell's for five gallons of oil. We went up there to Furnell's; Bath Park folks used gasoline. I understood I was going for gasoline. We asked Mr. Furnell for five gallons of oil. Furnell said he had none to spare. We then went to Locust Grove. I did not hear the conversation between Constine and Walker; heard Walker tell Schuschardt not to take any light with him. Schuschardt did

take a light with him. We went down in the cellar; cannot tell what kind of a floor it had. Schuschardt took the lantern in with him and began to pour the oil from the barrel first into one of our pails. We had common water pails; no covers. Schuschardt drew the oil from the barrel by turning the barrel down on its side. He did not have to turn the barrel over very far to make the oil run out. The barrel had a piece of gas-pipe stuck into it for a faucet or tube. When we found one pail leaking Schuschardt poured the oil into a square oil can. In pouring the oil some ran out of pail through the leaks and other spilled out while pouring from pail to can. I noticed fire coming up to my face; began on the floor;
207 can't say whether near the barrel or lamp. The lamp was about ten feet from the barrel. Then Schuschardt hollowed fire and ran out, and that is the last I ever saw of him. My coat was on fire, and I laid in the sand and put it out. When I went into this room I noticed two barrels. I can't say that I noticed any particular difference in their size; paid no attention; think they were both blue; noticed nothing peculiar to the smell. These two barrels were about five or six seet apart; noticed no name or mark on either. I saw Schuschardt outside of the building when he hollowed fire; cannot say how long I had been in there before the fire started; should say about ten minutes. That is the nearest I can get to the time.

By JUROR: Remember Constine telling Schuschardt to keep the light away. Constine did not give any reason. When I first saw fire was near the barrels; can't say which way oil ran; lamp—closed lamp. It sat on the floor; can't say how much leaked out; pail about three-quarters filled when leak discovered. Most of it went on the floor; not all. Schuschardt said nothing when he saw the oil scattered over the floor. I know the difference between a keg and a barrel; think the oil was drawn from a barrel; did not notice anything that looked like a small keg. Schuschardt did not spill any more oil than he could help. He had a piece of an iron pipe. We had no funnel. When he found leak he poured from pail into can. This can had but small neck, about one inch in diameter; had no funnel. The barrel had this piece of gas-pipe without any stop to it, and the oil flow was stopped by turn-
208 ing the barrel back on its head. I am sure that the first oil drawn was taken from this barrel. The good pail—the tight one—I had. That was filled first, and from the barrel, and handed to me by Schuschardt, because I know I had it in my hand holding it from the floor when the fire broke out. I must have dropped it; I was frightened. I was between the lamp and the door. The lamp was inside the door, about six or eight feet inside. The barrel where the oil was drawn was about ten feet from the lamp. When I received the pail filled and stood in the doorway, inside, as soon as I noticed the fire, Schuschardt sprang past me and ran out. Constine and I got out together, as near as I can make it out. I did not go anywhere near the lamp with my pail of oil. I know I did not drop any oil. After Constine handed me the pail I stood looking out the door with my back to Schuschardt and Constine. I

mean to say that the pail I had was first filled, and then before Constine handed the filled pail to me Schuschardt began filling the leaky pail and had to pour it in the can. I know I had the pail full when the fire broke out and saw the filling of the other pail; heard no noise except kind of sissing noise or explosion; saw kind of a flash run all over the floor; swept the floor.

his
JAMES x MARION.
mark.

A. G. C. J., *Coroner.*

On cross-examination the witness CROPSEY testified:

I began summoning the jury about two o'clock in the afternoon of the 16th August, 1879, and began proceedings about six
209 o'clock. Hennessy was the first witness called. We had asked some questions of Walker before Hennessy's testimony was taken down. I put the questions to Mr. Hennessy and his testimony is in my handwriting. I did not write down the questions put and the answers given. I took the testimony in narrative form. I took the testimony in the same manner that I took testimony on trials at special sessions. That was my habit.

Q. Now, Mr. Cropsey, in these words you say Hennessy swore to: "I will swear that Mr. Walker had no gasoline about the premises, nor did he have any lamps for its use." Was that in answer to a question that you put?

A. Yes, sir. The question was what Mr. Walker had there, if he had any gasoline there.

Q. How came you to put that question?

A. The night of the fire I heard some one shout, "Look out for the gasoline tank," and that was the reason I put the question. At that time there had been no evidence before me at that inquest about a half barrel of benzine there. I never heard of it at that time. I had not benzine in my mind when I asked the question.

Q. And when did you first hear about a half barrel of benzine having been bought by Walker and delivered at the Locust Grove Hotel on the 13th of August, 1879?

A. It was on the day after the inquest adjourned, at which Hennessy and Walker failed to appear, and I inquired myself. I wanted him back; I wanted to examine him more about the fire and upon the whole subject.

Q. In how many trials have you been engaged in assisting
210 the plaintiffs' counsel?

A. The trial last year and this one. These two trials.

On redirect examination he testified:

I was so engaged on the trial about a year and a half after Mr. Gunther's death. He died in 1885, and I was first here in 1887.

Q. Prior to that time you had not been here?

A. Never had any dealings with the gentleman in any shape or form nor with his family.

CHARLES G. KING testified:

In the summer of 1879 I was purser of the steamboat "Bay Ridge." I am not in any employment now. The "Bay Ridge" ran from New York to Locust Grove. I took my meals at the Locust Grove Hotel. I was on the pavilion every night and every day. The pavilion was lighted with lamps. They had one large lamp; it used to be a head-light for an engine. The other lamps were reflecting lamps. I know what a gasoline torch is. I did not see any one on the pavilion in the summer of 1879. I was in the dining-room when the fire broke out. There was no light in the dining-room. I was eating without any lamp-light. There is a piazza over the dining-room. The fire took place about seven o'clock; about two or three minutes after seven; between six and seven. I was quite often in the oil-room. I don't know. I don't think I was there the
211 day of the fire. I think I was there the day before. I used to keep things belonging to the boat there. Oil and stuff like that we used on the boat we kept there; take it from the barrels and take it down to the boat in cans. The last time I was there there were two or three that day. There never were more than two or three barrels there. I never saw a keg or half barrel there. I knew a man by the name of Schuschardt. I knew where he lived. It was about half a mile from Locust Grove. He kept a shoe store and had little notions there. A women used to attend it. He kept tobacco and candy, something like that. He had a couple of torches with a large oval and pipe to it and underneath a stop-cock; regular torches.

On cross-examination he testified:

I saw those torches in front of Schuschardt's place when I was going to Bath. I used to go up there every night. I don't remember whether he had them there in 1878. I don't know whether I have been asked about these torches before. I think I was asked the question.

Q. You think that he had a couple of torches in front of his place in 1879?

A. I know he had, sir. I saw them hanging there, that is all. I saw them every night when I would go to Bath.

Q. All through the summer?

A. Yes; before the 4th of July. I never went down there before June.

212 JOSEPH E. MORRIS testified:

I am a policeman. I was constable of the town of Gravesend. I used to be on the pavilion of the Locust Grove Hotel in the evenings in July and August, 1879. I knew how the pavilion was lighted. It was lit with kerosene lamps—square lamps. I know what a gasoline torch is. I never saw one at the hotel or pavilion. I have seen them elsewhere. When the fire broke out I was on the stoop at Pavolia, at Coney Island. I was quite a way off. The first I saw of it my attention was called by some one, who said there was a

smoke there and asked me if it wasn't a fire. It was about fifteen minutes after sundown.

On cross-examination he testified:

I had nothing to do with lighting the pavilion.

Plaintiffs rest.

LOTTIE SMART was called on the part of the defendant and testified:

I knew Mr. Schuschardt and his wife. I was his sister-in-law. Mrs. Schuschardt died February 18, 1879. Up to and before her death she kept a little candy store. After her death it was given up. There was a butcher shop came into it then. That continued three years. After that it was idle, except Mr. Schuschardt
213 moved his carpenter's tools and things up to a room and carried on a little business himself during the hours of day, while at the evenings he was up to Locust Grove. He was a cobbler.

On cross-examination she testified:

Schuschardt had a daughter. She was living the last time I heard from her. At present she should be very near eighteen years old. The butcher shop was given up in March. After that he did not keep a little store. He kept a cobbler place there and he kept it there up to the time of his death. There was a few jars around the store. I suppose those were the leavings of what he had when he kept the candy store, or, at least, when she kept it. I lived within a block or a block and a half of the place. I was there nearly every day. I never seen any torches around the place.

JOSEPH STEHLEIN recalled, and testified:

I heard the witness King say he had seen torches in front of Schuschardt's house in 1879. Schuschardt owned the house he lived in. I am familiar with the premises and were in 1879. I passed there every day several times, day and night—in the evenings. He never had any burning lights. They had no candy business in 1879; they had a candy business there in the spring of 1879. Mr. Crummet carried on a butcher's establishment there in the spring of 1879. He was there about three months and he went away the latter part of March or first of April; something like that. After
214 that Schuschardt did cobbling, fixing old shoes, whatever he could get hold of.

Testimony closed.

The counsel for the defendant then asked the court to direct the jury to find a verdict in favor of the defendant on the ground that as the established cause of the fire was the drawing, in the oil-room of the insured premises about dusk, in the vicinity of a lighted lamp, of a fluid product of petroleum under the circumstances shown by the evidence, not for filling lamps on the insured premises, but

for another and different purpose, this of itself and irrespective of other questions in the case constitutes a violation of the several contracts of insurance in force at the time of the fire as contained in the policies, respectively, thereby rendering the said policies and each of them void and defeating the right of the plaintiffs to recover in this action; and as a separate motion the defendant's counsel asked for the direction of a verdict in favor of the defendant upon the whole case in respect to both policies. (The counsel for the plaintiffs opposes both motions.)

The plaintiffs' counsel requests the court to submit to the jury whether there was any naphtha, gasoline, or benzine on the insured premises at the time of the fire.

The court denied the plaintiffs' motion, and the plaintiffs' counsel excepted.

215 The counsel for the plaintiffs also requests the court to submit to the jury whether the fluid which was drawn from a barrel in the oil-room at the time of the fire was so drawn in the presence of a lighted lamp.

The counsel for the plaintiffs states that the last request is upon the ground that the testimony of the witnesses upon that subject is of such a character that the jury would be justified in rejecting their testimony as incredible.

The court also denied said requests, and the plaintiffs' counsel excepted.

The court thereupon granted the requests and motion made by the counsel for the defendant on the grounds stated in the opinion heretofore rendered in this case, as set forth at page 501, vol. 34, of the Federal Reporter, and directed the jury to find a verdict for the defendant.

To the rulings of the court upon the requests of the defendant's counsel and directing a verdict for the defendant the counsel for the plaintiffs as to each of them duly excepted. The jury, under the direction of the court, thereupon rendered a verdict in favor of the defendant; to which direction the plaintiffs excepted.

And inasmuch as the matters aforesaid do not appear upon the record or otherwise than by this bill of exceptions, on the prayer of the said plaintiffs, by their counsel, the said judge has settled and allowed as of the term when the said cause was tried, to wit, the November term, A. D. 1888, and thereupon the said judge has signed the same with his hand as of the 21st of November, A. D. 1888.

E. HENRY LACOMBE.

216 UNITED STATES CIRCUIT COURT, } ss:
Eastern District of New York, }

I, B. Lincoln Benedict, clerk of the circuit court of the United States for the eastern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from *a* to *m* and from 1 to 215, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Amelia

Augusta Gunther, as executrix, and George A. Gunther, as executor, of the last will and testament of Charles Godfrey Gunther, deceased, *vs.* The Liverpool and London and Globe Insurance Company as the same remain of record and on file in my office.

The Seal of the Circuit Court, Eastern District of New York.

In testimony whereof I have caused the seal of the said court to be hereunto affixed this 8th day of October, in the year of our Lord one thousand eight hundred and eighty-nine, and of the Independence of the United States the 114th.

B. LINCOLN BENEDICT, *Clerk.*

217 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the eastern district of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between Amelia A. Gunther and George A. Gunther, as executors and trustees of the last will and testament of C. Godfrey Gunther, deceased, plaintiffs, and The Liverpool and London and Globe Insurance Company, defendant, a manifest error hath happened, to the great damage of the said Amelia A. Gunther and George A. Gunther, as such executors, as is said and appears by their complaint, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

The Seal of the Circuit Court, Eastern District of New York.

Witness the Honorable Melville W. Fuller Chief Justice of the Supreme Court of the United States, this 28th day of August, in the year of our Lord one thousand eight hundred and eighty-nine, and of the Independence of the United States the one hundred and fourteenth.

B. LINCOLN BENEDICT,
Clerk of the Circuit Court of the United States of America for the Eastern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.

E. HENRY LACOMBE.

217½ [Endorsed:] X'd. 4–501. Supreme Court of the United States. Amelia A. Gunther and George A. Gunther, as executors, &c., of C. Godfrey Gunther, dec'd, plaintiffs in error, *vs.* The Liverpool and London and Globe Insurance Company, defendant in error. Writ of error. C. Bainbridge Smith, attorney for plaintiffs in error, 94 Liberty street, N. Y. city. Service of a copy of the within writ of error is hereby admitted this 29th day of August, 1889. Butler, Stillman, & Hubbard, attorneys for defendant in error. Filed August 28th, 1889.

UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the *following* pages, numbered from — to —, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause of —— ——, plaintiff in error, against —— ——, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this — day of ——, in the year of our Lord one thousand eight hundred and eighty- —, and of the Independence of the United States the one hundred and —.

—— ——, *Clerk.*

218 The United States of America to the Liverpool and London and Globe Insurance Company, defendant in error, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of New York, wherein Amelia A. Gunther and George A. Gunther, as executors of the last will and testament of Charles Godfrey Gunther, deceased, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why judgment rendered against said plaintiffs in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 28th day of August, in the year of our Lord one thousand eight hundred and eighty-nine.

E. HENRY LACOMBE.

219 [Endorsed:] X'd. 4–501. Supreme Court of the United States. Amelia A. Gunther and George A. Gunther, as executors of the last will and testament of C. Godfrey Gunther, deceased, plaintiffs in error, ag'st The Liverpool and London and Globe Insurance Company, defendant in error. Citation. C. Bainbridge

Smith, attorney for plaintiffs in error, 94 Liberty St., N. Y. city. Service of a copy of the within citation is hereby admitted this 29th day of August, 1889. Butler, Stillman & Hubbard, att'ys — def'ts in error. Issued August 28, 1889.

220 United States Supreme Court.

AMELIA A. GUNTHER and GEORGE A. GUNTHER, as Executors of the Last Will and Testament of Charles Godfrey Gunther, Deceased, Plaintiffs in Error,
ag'st
THE LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY, Defendant in Error.

Afterwards, to wit, on the second Monday of October term, 1889, before the justices of the said court, at the Capitol, in Washington, come the said plaintiffs in error, by C. Bainbridge Smith, their attorney, and say on the record and proceedings aforesaid there is manifest error, in this, to wit:

1. That there was error in directing a verdict for the defendant.
2. That there was error in not submitting to the jury, as requested, the question whether there was any nap-tha, gasoline, or benzine on the insured premises at the time of the fire.
3. That there was error in not submitting to the jury, as requested, the question whether the fluid which was drawn from a barrel
221 in the oil-room at the time of the fire was so drawn in the presence of a lighted lamp.
4. That there was error in not submitting to the jury, as requested, that the testimony of the witnesses as to the drawing of said fluid in the presence of a lighted lamp is of such a character that the jury would be justified in rejecting their testimony as incredible.
5. The plaintiffs in error further assign for error the several pleadings, admission of testimony and refusal to admit testimony, and the direction of the court which were by them made grounds of exceptions, as by the bill of exceptions in this record appears.

And the said plaintiffs pray that the judgment aforesaid for the errors aforesaid and other errors in the record and proceedings aforesaid may be reversed, annulled, and altogether held for naught, and that said plaintiffs may be restored to all things which they have lost by occasion of said judgment.

C. BAINBRIDGE SMITH,
Attorney for Plaintiffs in Error.

222 [Endorsed:] X'd. 4–501. Supreme Court. Amelia A. Gunther and George A. Gunther, as executors of the last will and testament of Charles Godfrey Gunther, deceased, plaintiffs in error, ag'st The Liverpool and London and Globe Insurance Company, defendant in error. Assignment of errors. C. Bainbridge Smith, attorney for plaintiffs in error. Service of a copy of the within assignment of errors is hereby admitted this 29th day of

August, 1889. Butler, Stillman & Hubbard, att'ys for def't in error. Filed August 28, 1889.

[Endorsed:] U. S. Supreme Court. Amelia A. Gunther, executrix, &c., & ano., *vs.* The Liverpool and London and Globe Insurance Co. Record.

Endorsed on cover: E. New York C. C. U. S. No. 1367. Amelia A. Gunther and George A. Gunther, as executors and trustees of the last will and testament of C. Godfrey Gunther, deceased, plaintiffs in error, *vs.* The Liverpool & London & Globe Insurance Company. Filed October 15, 1889.

Office Supreme Court U. S.
FILED.
OCT 21 1889
JAMES H. MCKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1367.

AMELIA A. GUNTHER AND GEORGE A. GUNTHER, EXECUTORS OF CHARLES GODFREY GUNTHER, DECEASED, PLAINTIFFS IN ERROR.

vs.

THE LIVERPOOL & LONDON & GLOBE INSURANCE COMPANY, DEFENDANT IN ERROR.

MOTION PAPERS TO ADVANCE CASE.

C. BAINBRIDGE SMITH,
Attorney for Plaintiffs in Error.

BUTLER, STILLMAN & HUBBARD,
Attorneys for Defendant in Error.

Evening Post Job Print.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1367.

AMELIA A. GUNTHER AND GEORGE A. GUNTHER, EXECUTRIX AND EXECUTOR, &C., OF CHARLES GODFREY GUNTHER, DECEASED, PLAINTIFFS IN ERROR,

against

THE LIVERPOOL & LONDON & GLOBE INSURANCE COMPANY, DEFENDANT IN ERROR.

Gentlemen: Please take notice that on the annexed petition, and on the record and proceedings on file with the Clerk of this Court, a motion will be made on the part of the plaintiffs in error before the United States Supreme Court, to be held at the Capitol in the City of Washington, on Monday, the 28th day of October, 1889, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, that this case be advanced on the calendar and set down for argument on a certain day to be named by the Court, or for such other order or relief as to the Court shall seem meet.

New York, October 18, 1889.

Yours, &c.,

C. BAINBRIDGE SMITH,
Atty. for Plaintiffs in Error.

To Messrs. BUTLER, STILLMAN & HUBBARD,
Attorneys for Defendant in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1367.

AMELIA A. GUNTHER AND GEORGE A. GUNTHER, EXECUTRIX AND EXECUTOR, &C., OF CHARLES GODFREY GUNTHER, DECEASED, PLAINTIFFS IN ERROR,

against

THE LIVERPOOL & LONDON & GLOBE INSURANCE COMPANY, DEFENDANT IN ERROR.

The petition of Amelia A. Gunther and George A. Gunther, the executrix and executor, &c., plaintiffs in error, respectfully shows to this Court:

That this action was commenced by Charles Godfrey Gunther against the defendant, The Liverpool & London & Globe Insurance Company, on the 22d day of December, 1879, in the Supreme Court of the State of New York.

That the cause was duly removed by petition on the part of the said defendant to the Circuit Court of the United States for the Eastern District of New York on or about the 7th of April, 1880.

That the action was brought on two policies of insurance issued by the defendant to the said Charles Godfrey Gunther; one policy was for $20,000 on the two-story hotel situated on Gravesend Bay at Bath, Long Island, and the other policy was for $8,500 on furniture, wines, provisions, horses in the said building and stables. There was a total loss of all the property, and judgment was demanded for said sums and interest.

That the said plaintiff, Charles Godfrey Gunther, on the 23d day of November, 1881, recovered judgment in said action against the said defendant for the sum of $29,977.38, and by a writ of error to this Court the cause was argued and decided by this Court on its merits during the October Term of this Court in the year 1885, and the said judgment was reversed and the cause remanded with directions to the Court below to grant a new trial. The said case is reported in the 116 U. S. R., 113.

That before the argument of said cause in this Court on said writ of error the said Charles Godfrey Gunther departed this life and his executors, the above-named plaintiffs in error, were duly substituted in his place and stead.

That in the month of February, 1888, the action was tried before Hon. E. Henry Lacombe, Circuit Judge, and the jury rendered a verdict for the plaintiffs. That afterward and on the 17th day of March, 1888, the said Judge set aside the ver-

dict and ordered a new trial. The case is reported in the 34 Federal R., p. 501.

That on the 21st day of November, 1888, the cause was again tried before the same judge, and on the close of all the testimony the counsel for defendant moved that the Court direct a verdict for the defendant, which motion was granted by the Court on the grounds set forth in his opinion in said 34 Federal Reporter, p. 501, to which the plaintiffs excepted and judgment was duly entered in favor of the defendant.

The testimony on all of said trials was substantially the same.

The cause now comes before this Court by writ of error to the said Circuit Court of the United States for the Eastern District of New York to review the last mentioned judgment.

Your petitioners allege on information and belief that the said case has been duly docketed and is No. 1367 on the present calendar of this Court.

That the estate of the said Charles Godfrey Gunther, deceased, cannot be settled or closed until the determination of this action.

And your petitioners pray that inasmuch as the case has once been adjudicated by this Court upon the merits that an order be made advancing the same on the present calendar to an early day to be named by the Court.

NEW YORK, October 18, 1889.

C. BAINBRIDGE SMITH,
Atty. for Petitioners and Plaintiffs in Error.

STATE OF NEW YORK,)
City and County of New York,) ss.:

C. BAINBRIDGE SMITH, being duly sworn, says that he is the attorney for the plaintiffs in error in this action; that the foregoing petition is true to his own knowledge, except as to those matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

Sworn to before me this 18th day of October, 1889. C. BAINBRIDGE SMITH.

ERNEST WHARTON SCHENCK,
Notary Public (15),
N. Y. Co.

Admission and Statement of Attorney for Defendant in Error.

We admit due service this day of the foregoing motion papers and concur in the motion, provided that the case be not assigned for any day earlier than thirty days after the printed record shall be received by us.

Dated New York, October 18, 1889.

BUTLER, STILLMAN & HUBBARD,
Attorneys for Defendant in Error.

WM. ALLEN BUTLER,
Of Counsel.

Office Supreme Court U. S.
FILED.
JAN 9 1890
JAMES H. McKENNEY
CLERK

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1889.

No. 1,367.

AMELIA A. GUNTHER and GEORGE A. GUNTHER, Executors and Trustees of CHARLES GODFREY GUNTHER, deceased,

Plaintiffs in Error,

vs.

THE LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY.

BRIEF FOR DEFENDANT IN ERROR.

BUTLER, STILLMAN & HUBBARD,

Attorneys for Defendant in Error.

WILLIAM ALLEN BUTLER,

Of Counsel.

Evening Post Job Print, New York.

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 1367.

AMELIA A. GUNTHER and GEORGE A. GUNTHER, as Executors and Trustees of the Last Will and Testament of C. Godfrey Gunther, deceased,
Plaintiffs in Error,

vs.

THE LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

Statement of the Case.

This cause comes before this Court on a writ of error to the Circuit Court of the United States for the Eastern District of New York, to review a judgment entered in favor of the defendant below upon a verdict directed by the Court at the trial.

Writ of Error and Assignments of Error, Rec. fols. 217, 230, 221.

The action was originally commenced, December 22,

1879, in the Supreme Court of the State of New York, in and for the County of Kings, by Charles Godfrey Gunther as plaintiff against the Liverpool and London and Globe Insurance Company, a foreign corporation, organized under the laws of Great Britain and Ireland, to recover an alleged loss under two policies of insurance against fire issued by the defendant corporation upon the property of the plaintiff, known as the Locust Grove Hotel, situated at Gravesend, Bath, Kings County, Long Island, and destroyed by fire August 15, 1879.

The action was duly removed into the Circuit Court of the United States for the Southern District of New York.

See Petition, Bond and Order for Removal, Rec., pp. 1–6.

The COMPLAINT alleged the issuing by the defendant of two policies, dated respectively November 16, 1877, one (numbered 2,255,926) being for $20,000 on the hotel building, with frame kitchen and frame pavilion adjoining; $1,000 on the two-story frame stable, and $200 on the frame bathing-houses, and $100 on the frame out-houses, in all, $21,300; and the other (numbered 2,255,927) for $8,500 on the hotel furniture, wines, horses, carriages, &c., and that both said policies were duly continued in force until August 15, 1879, when a fire occurred causing a total destruction of the insured premises and property. The complaint alleged performance by the plaintiff of the conditions of the policies, due proof of loss, demand and refusal of payment, and prayed judgment against the defendant for $29,800, the total amount of the two several policies of insurance, with interest from August 16, 1879, and costs.

Complaint, fols. 2–8.

The ANSWER of the defendant, as amended by leave of the Court (*see order granting leave to amend, fols.* 9, 10), admitted the issuing of the several policies alleged in the complaint and the happening of the fire as therein alleged, denied the allegations of performance by plaintiff of the conditions of the policies, and then set up in substance

that the fire originated and was caused by a breach of the following conditions contained in each of the policies:

"If the assured shall keep gunpowder, fireworks, nitro-
"glycerine, phosphorus, saltpetre, nitrate of soda, petro-
"leum, naphtha, gasoline, benzine, benzole or benzine
"varnish, or keep or use camphene, spirit gas, or any
"burning fluid or chemical oils, without written permis-
"sion in this policy, then and in every such case this
"policy shall be void; ALSO that petroleum, rock-earth,
"coal, kerosene or carbon oils of any description, whether
"crude or refined; benzine, benzole, naphtha, camphene,
"spirit gas, burning fluid, turpentine, gasoline, phosgene,
"or any other inflammable liquid, are not to be stored,
"used, kept, or allowed on the above premises, temporar-
"ily or permanently, for sale or otherwise, unless with
"written permission endorsed on this policy, excepting
"the use of refined coal, kerosene or other carbon oil for
"lights, if the same is drawn and the lamps filled by day-
"light; otherwise this policy shall be null and void."

The answer, as amended, specified the breaches of the foregoing conditions as follows:

"And the defendant avers that the said conditions of
"insurance were broken and violated on the part of the
"plaintiffs' testator, among other things, in that, with-
"out permission of the defendants indorsed on said poli-
"cies or otherwise, there were stored, used, kept or
"allowed on the insured premises mentioned and des-
"cribed in the said policies, petroleum, gasoline, benzine,
"benzole, kerosene oil, burning fluid, or other inflam-
"mable liquid or liquids prohibited by said policies; and
"defendant further avers that the fire mentioned and re-
"ferred to in the complaint originated and was caused
"by such storing, using and keeping and allowing of
"such prohibited articles on said insured premises; and
"defendant further avers as a further breach of said
"last-mentioned condition that kerosene, carbon oil, or
"other inflammable liquid so stored, used, kept, or allowed
"on said premises as aforesaid was drawn, not by day-
"light, but at or after dusk or dark and with a lighted

"lamp or lantern near, in violation of the express terms "of the said condition, and that the fire which destroyed "said premises was caused by such proximity of said "lighted lamp; and the defendant further avers that it is "advised and believes that the said policies thereby be- "came and were null and void."

The answer further alleged other breaches of the policies and demanded judgment of dismissal of the complaint.

Amended Answer, Rec. fols. 11–22.

The cause was first tried before Hon. HOYT H. WHEELER, November 15, 1881, and a verdict rendered for plaintiff. The judgment entered on this verdict was reversed by this Court for errors in the rulings and charge of the Circuit Court and a new trial ordered.

See Liverpool and London Insurance Co. v. *Gunther*, 116 U. S., 113.

A second trial was had before Hon. E. HENRY LACOMBE, Circuit Judge and a jury. At the close of the testimony, the defendant moved for the direction by the Court of a verdict for defendant on the ground that the undisputed cause of the fire was the drawing of a fluid product of petroleum by lamplight against the positive prohibition of the policies, which while permitting the use of kerosene oil for lights, provided that it should be drawn and the lamps trimmed and filled by daylight only, otherwise the policies to be void. The Court reserved this question and withdrew it from the jury, and submitted to the jury only the disputed question of fact, whether gasoline or benzine had been allowed on the premises against the prohibition of the policies.

After a verdict for the plaintiffs, a motion for a new trial was made by the defendant, the practice in the United States Courts not permitting a motion to direct judgment on the question of law reserved at the trial, according to the practice of the English Common Law courts and of the courts of New York, and, after full argument the motion was granted and a new trial ordered.

See Gunther v. L. & L. & G. Ins. Co., 34 Fed. Rep., 501, where the above facts as to the course of the trial and the reservation of the question of law are stated in the opinion of the Court.

A third trial was had before Judge LACOMBE and a jury November 21, 1888.

Facts appearing at the Trial.

The plaintiffs proved the two policies of insurance set forth in the complaint, each bearing date November 16, 1877.

Each of these policies contained in the body thereof a declaration that the insurance is "subject to the following "conditions and stipulations which constitute the basis of "this insurance" (*fol.* 32). Then follow the conditions:

"1. * * * If the assured shall keep gunpowder, "petroleum, naphtha, gasoline, benzine, benzole, or ben- "zine varnish, or keep or use camphene, spirit gas, or "any burning fluid or chemical oils, without written per- "mission in this policy, then and in every such case this "policy shall be *void*" (*fols.* 33, 34, 46, 47).

"6. * * * The use of general terms or anything "less than a distinct specific agreement, clearly expressed "and endorsed on this policy, shall not be construed as a "waiver of any printed or written condition or restriction "therein" (*fols.* 36, 49).

"11. * * * Petroleum, rock-earth, coal, kerosene, "or carbon oil of any description, whether crude or re- "fined; benzine, benzole, naphtha, camphene, spirit gas, "burning fluid, turpentine, gasoline, phosgene, or any "other inflammable liquid, are not to be stored, used, "kept, or allowed on the above premises, temporarily or "permanently, for sale or otherwise, unless with written "permission endorsed on this policy, excepting the use of "refined coal, kerosene, or other carbon oil for lights, if "the same is drawn and the lamps filled by daylight, "otherwise this policy shall be null and void" (*fols.* 41, 54.)

Each of the policies, No. 2,255,926 on the hotel and out-buildings, for $21,300, and No. 2,255,927 on the furniture

and stores, for $8,500, had a printed slip or rider attached to and pasted on the face of the policy, as follows:

"*Privileged to use kerosene oil for lights; lamps to be* "*filled and trimmed by daylight only Attached to policy* "2,255,926. *B. & B. Agts.*"

The same as pasted on policy 2,255,927 referred to the number of that policy (*fol.* 55).

This privilege was attached to the policies by Henry V. Beecher, one of the firm of Beecher & Benedict, the agents who issued the policies to Gunther, the insured, in person. Beecher signed the firm's initials to the privileges.

See the printed Privileges, fols. 42, 55.
Beecher, fols. 148, 149.

The slips containing the privilege were pasted on both policies at the time the policies were issued and delivered therewith, and were in the usual form of ordinary kerosene privileges.

Beecher, fols. 147, 148.

Both the policies, as originally written, contained the following "privilege to use gasoline gas, gasometer, "blower and generator, being underground, about 60 feet "from main building in vault, no heat employed in process" (*Policies, fols.* 31, 44).

Prior to 1879 the pavilion of the Locust Grove Hotel had been lighted by gasoline, generated in a gasometer under the above privilege, but its use was discontinued in the fall of 1878, at the end of the season, and it was not used in 1879 (*Gunther, fol.* 180).

On the hotel policy No. 2,555,926 there was written on the margin:

"*Sept.* 17, 1878. *Privilege to keep not exceeding five* "*barrels of kerosene oil on said premises. B. & B. Agts.*"

See fol. 42. *Beecher, fol.* 149.

This last mentioned writing was not on the furniture policy No. 2,555,927.

The plaintiffs then proved the renewal of the several policies for a term expiring July 15, 1880 (*fols.* 13, 56.)

No question was made as to the revival of the action in the names of the present plaintiffs who are the executors of the original plaintiff, nor as to the total destruction of the insured premises and property August 15, 1879, nor as to the amount of loss under both policies which was agreed to be, with interest to the date of trial, $41,116.64 (*fol.* 56).

The plaintiffs then rested.

No proof whatever was given by the plaintiffs as to the cause of the fire.

The defendant then gave evidence to prove the affirmative defenses set up in the answer.

This proof was directed to two points:

FIRST.—The origin and cause of the fire, which resulted from an explosion and fire in the oil room of the Locust Grove Hotel, while a fluid product of petroleum was being drawn and poured into a vessel in the presence of a lighted lamp, against the prohibition of the policies as to drawing kerosene oil or filling lamps except by daylight only, and not for lighting the insured premises; and,

SECOND.—The allowance and use on the premises of gasoline or benzine, against the special prohibition of the policies as to these inflammable fluids.

The evidence as to the first of these points was uncontradicted.

The fact that the fire was caused as above stated was established by direct and positive proof. As to the question whether the fluid, the drawing and pouring of which occurred in the oil room, was kerosene oil or was gasoline or benzine, the evidence was conflicting.

Briefly stated, the uncontradicted facts as to the origin and cause of the fire were as follows:

During the season of 1879 the Locust Grove Hotel was in charge of John E. Walker, husband of Mrs. Fanny Walker, the lessee of the hotel (*fol.* 57). Mr. Gunther, the owner, lived in the hotel with his family (*fols.* 159, 176, 182). The

hotel premises included about four acres; the whole plot contained about twelve acres (*fol.* 203). The hotel building had attached to it a pavilion about 250 feet long and 60 feet wide. Wooden posts, about a foot or ten inches square, ran along the pavilion and supported the upper story. The pavilion was partly open and partly closed. There was a music stand, a bar and a lunch counter on it, and where these were it was closed with boards (*fols.* 103, 104, 124).

There was an oil room in the basement of the hotel under the pavilion, about 10 x 12 feet in dimensions, with a low ceiling and with a step leading down from the outside into it. In this room the lighting material of the hotel was kept. During the summer of 1879 Mr. Gunther and guests of the hotel found fault with Walker in respect to the lighting of the pavilion, and wanted "that they should have better light and more "properly lighted." Mr. Gunther volunteered "to get "some additional lights" (*Gunther fols.* 176, 177). The lights then in use were railroad lamps, common kerosene lamps (*Frickie, plaintiff's witness, fol.* 167). Mr. Gunther then ordered new kerosene lanterns which were put up (*Gunther, fol.* 177; *Jacobs, fol.* 192).

On August 13, 1879, Walker purchased of L. G. Wilkin, dealer in oil, 5 Cedar street, New York City, a barrel of kerosene oil, 150 fire test, containing 45 to 53 gallons, and a half barrel of benzine, containing 21½ gallons. Both packages were delivered to Remsen's express for Locust Grove Hotel, and were taken by Remsen's express and delivered at the usual place of delivery of articles for the hotel, "on the grass between the pavilion and the main building," on the same evening about 8 or 9 o'clock, and were both receipted for by Walker himself (*Wilkin, fol.* 57; *express receipt, fol.* 58; *Kimball,* 61–62; *Walker's receipt, fol.* 62; *Langdon, fol.* 64).

The barrel of kerosene oil was placed in the oil room on August 14, 1879. Rogencamp, one of plaintiff's witnesses, who worked for Gunther and also at times for Walker, testified that he saw it on the grass plot in front of the hotel on the evening of the 13th, and the next day he helped Schuchardt, the night watchman, who had charge

of the oil room and lamps, to put it in the oil room and tap it (*Rogencamp, fols.* 162–163).

Shelley, one of the defendant's witnesses, testified to placing the half barrel of benzine in the oil room on August 14th (*fol.* 93). This was disputed, but as to the barrel of kerosene oil there was no conflict as to its presence in the oil room.

The fire occurred about dusk "on the evening of August 15, 1879.

"*It was about dusk*" (*Gunther, fol.* 159).

Mr. Gunther, the insured, who was seated on the hotel piazza, in sight of the pavilion, "saw some parties with pails and a light." Shortly afterwards he saw "the men come out as though they were afire;" * * * "in another instant," he continued, "I saw the oil room burning." The wind was blowing very hard and "immediately the pavilion caught." Nothing could save the building. Two men and two women lost their lives by attempting to go into their rooms. In an hour or less the destruction was complete (*Id., fols.* 159, 160).

Of the three persons seen by Gunther to enter the oil room with pails and a light only two survived the fire. They were Jacob Constine and James Marmion, young men employed at the time at the Bath Park Hotel, about a mile distant from Locust Grove. The Bath Park Hotel used gasoline for lighting the pavilion attached to the hotel. The gasoline was kept in a tank in a tree from which the burners on the pavilion were supplied (*Schwenck, fol.* 118). In the afternoon of August 15, 1879, the manager of the Bath Park Hotel discovered he was out of gasoline and notified Mr. Pier, the proprietor. Afterwards, about five o'clock, Constine and Marmion were sent each with an ordinary wooden pail with directions to go to Furnell's Atlantic Hotel, about half a mile from the Bath Park Hotel, "to get two pails of gasoline" (*Id., fols.* 117, 119, 120). They walked from the Bath Park Hotel to Furnell's (*Constine, fol.* 65). It was about five to seven minutes walk (*Id.*). At Furnell's they were told they were "out of oil" (*fol.* 79). *N. B.—Both Constine and Marmion use the term "oil," as meaning gasoline* (*see fols.* 74, 82, 83, 84, 85, 86). They then went to the Locust

Grove Hotel, nearly a mile distant from Furnell's; Marmion walked, Constine took the cars, arrived first, and waited for Marmion (*fol.* 65). They saw Walker and asked for the loan of five gallons of oil (*fol.* 79), Walker told Schuchardt to give it to them (*fols.* 79, 80). Schuchardt then came with a closed lantern (*Id.*). "It was "lighted. It was an ordinary stable lantern, such as are "used every day, with wire to swing it, and small holes "around the top—inclosed in a glass. Schuchardt placed "it on the sill going in—on the door sill" (*fols.* 66, 85). All three went into the oil room. Schuchardt then began to draw from a barrel into one of the pails. He drew from the barrel through a piece of gas pipe or iron pipe used as a faucet (*Id.*). When one of the pails was filled it was found to leak and the contents were poured into the other pail. Schuchardt moved the lamp nearer the barrel (*fols.* 67, 80, 86) and got a tin can into which he began to draw from the barrel (*fols.* 67, 73, 80, 86). At this point "a "blue flame drew across the floor as if you drew a broom "across it" (*fol.* 86). There was "sort of a thundering "noise and in an instant the whole place was an entire mass "of flame." Schuchardt got out first but was burned to death. Constine "ran for the river and jumped overboard," he was burned very severely and was abed for thirteen weeks. Marmion rolled in the grass and was not badly burned (*fols.* 67, 87).

As stated by the learned Circuit Judge in his opinion granting a new trial: "There was some conflict as to the "precise time of the explosion, but all the testimony "showed that it was about dusk, darker in the oil room "than it was outside, and that there is no dispute that the "oil was not being drawn by daylight only."

34 Fed. Rep., *p.* 502.

There being no conflict of evidence as to the original cause of the fire and as to what occurred in the oil room, the only point in dispute was as to whether the fluid drawn and poured in the oil room by the light of the lamp, and whose vapors came in contact with the light, was kerosene oil taken from the barrel purchased and sent to the hotel by Walker on August 13, 1879, or ben-

zine taken from the half barrel of benzine purchased and sent to the hotel by him at the same time.

This question of fact was the subject of much testimony on both sides. On the part of defendant there was direct evidence as to the placing of the half barrel of benzine as well as the barrel of kerosene oil in the oil room on the morning of August 14th (*Shelley, fol.* 93); of its presence there before the fire and the drawing from it by a guest of the hotel to remove a grease spot from his clothes (*Azoy, fols.* 94, 95); and of its being seen and noticed by another guest who went to the oil room the day before the fire to leavea pair of shoes with Schuchardt, who was a cobbler by trade, for mending (*Mrs. Evans, fol.* 55).

Also that after the complaints as to the insufficient lighting of the pavilion some of the torches which had been used during the former season for burning gasoline had, by Gunther's orders, been got out from the laundry where they had been stored, and used for burning gasoline or benzine on the pavilion shortly before and up to the time of the fire. These torches were of metal with a receptacle at the top holding about a quart of fluid, which flowed down through a pipe about two feet in length at the end of which was a cup, into which the fluid is turned by a stop-cock, and on lighting it a burner above the cup, perforated with holes, is heated to a point sufficient to transform the fluid into gas and produce a steady flame without the use of any wick (*Parson, fol.* 144; *Holly, fols.* 152, 152½; *Saybold, fol.* 157; *Wellington, fol.* 185). Torches of this description were on the pavilion in August, 1879 (*Mrs. Evans, fols.* 98, 99). "At least half a dozen" (*Azoy, fol.* 96). And gasoline was burned in them (*Id.*). "Four or five were put up on the pavilion and two in front of the music stand, and two in front of the lunch bar" (*Heennesey, fol.* 104; *Ham, fols.* 122, 123; *Sumner, fol.* 124; *Mrs. Bogart, fol.* 127; *Mrs. Stehlein, fols.* 127, 128). Brown, the leader of the band, and Spedich, one of the musicians in the band during the summer of 1879, saw them constantly burning in front of the band stand before the fire (*fols.* 130, 131). Stehlein who had charge of the gasoline in 1878 testified that four or five of the torches which were

in use in 1878 were used in the pavilion in 1879 (*fol.* 132, 133).

Witnesses called by the plaintiffs testified that they were in the oil room the day before the fire or the day of the fire, and that there was no half barrel of benzine there; and others testified that no torches were used in the pavilion in 1879, and that the only lighting of any of the old torches in 1879 was by way of experiment, and not with gasoline or benzine.

The plaintiffs did not, however, give any evidence as to what became of the half barrel of benzine after its delivery to Walker at the hotel.

Experts testified on behalf of the defendant that the fire, occurring under the conditions described by Constine and Marmion, must have been caused by the contact with the lighted lamp of the vapors of gasoline, benzine or naphtha, and not by vapor from kerosene oil of 150 degrees fire test (*Parson, fol.* 146; *Holly, fol.* 152; *Burke, fol.* 155; *Saybold, fol.* 157.)

An expert called for the plaintiffs "doubted its being benzine" (*Eastman, fol.* 187), and thought the vapor of kerosene might," under certain circumstances," have produced the fire (*Id*). Another thought benzine could not have caused the fire because the explosion would in that case have happened sooner than it did, according to Constine and Marmion's evidence, and would have immediately destroyed them (*Grimshaw, fols.* 197, 198).

All the expert witnesses agreed in stating that the lighter products of petroleum, gasoline, benzine and naphtha are volatile and inflammable, and all highly dangerous. No one of them can be transferred from one vessel to another without throwing off gas which is eliminated as soon as it is exposed to the atmosphere. Kerosene oil of 150 degrees fire test does not evolve gas and will not take fire from a lighted match until heated to 150 degrees, and will not ignite until heated to that point (*Eastman, fol.* 188).

At the close of the evidence the defendant moved for the direction of a verdict in its favor on the ground that the evidence established the fact that the fire was caused

by the drawing in the oil room in the vicinity of a lighted lamp of a fluid product of petroleum, not for filling lamps on the insured premises, but for another and different purpose, in violation of the policies of insurance (*fol.* 214).

The plaintiffs' counsel requested the Court to submit to the jury the questions whether there was any gasoline, benzine or naphtha on the insured premises at the time of the fire, and also whether the fluid drawn from a barrel in the oil room at the time of the fire was so drawn in the presence of a lighted lamp (*fols.* 214, 215).

The Court refused to submit any question to the jury, and directed a verdict for the defendant, which was accordingly rendered by the jury (*fol.* 216).

Judgment was entered on the verdict in favor of the defendant, and for costs, August 28, 1889 (*fol.* 25).

POINTS.

First Point.—The undisputed evidence at the trial established the fact that the fire which destroyed the insured premises and property was caused by the drawing and pouring of a product of petroleum in the oil room of the Locust Grove Hotel, not by daylight but by the light of a lamp, and not for the purpose of lighting the insured premises or any purpose connected therewith, but for use at another hotel.

I.—The evidence of Mr. Gunther, the insured, shows that the fire originated in the oil room immediately after three persons had entered it, one of them carrying a lighted lantern and the other two carrying pails.

Gunther, fols. 159.

Of the three persons who thus went into the oil room the two survivors, Jacob Constine and James Marmion, who are the only living men cognizant of what took place within it, are uncontradicted as to their statements that

the explosion and fire followed upon the drawing by Schuschardt, the night watchman, by the light of the lamp, of a lighting fluid from a barrel into one of the pails, and the pouring from such pail into the other pail, and the attempted further drawing into a tin can.

II.—There was no attempt on the part of the plaintiffs to impeach either of these witnesses. Nor was there any attempt to contradict their statements in any particular, except so far as the evidence given by them at the Coroner's inquest or at former trials was resorted to for that purpose.

The plaintiff's counsel requested the Court to "submit to "the jury the question whether the fluid which was drawn "from a barrel in the oil room at the time of the fire was "so drawn in the presence of a lighted lamp" (*Rec., fol.* 215), and stated that this was "on the ground that the "testimony of the witnesses upon that subject is of such "a character that the jury would be justified in rejecting "their testimony as incredible."

Nothing was pointed out in connection with the request to indicate wherein the testimony of either of these witnesses was incredible, and no point was made that in any material statement their evidence was contradicted by any previous evidence given by them respectively.

In fact these witnesses at the Coroner's inquest held after the fire, gave the same account of the origin of the fire as that given by them at the trial. Any variations between the statements of either of them at the inquest as compared with their statements respectively at the trial, or as compared with the statements of each other at the inquest and trial, will be found to relate to unimportant points, and are such as will always occur in the evidence of honest witnesses, testifying at different times as to the same occurrences. In all the main and essential parts of their respective statements there is absolute identity, and so far from being "incredible," their evidence affords a complete and satisfactory explanation of the origin of the fire.

III.—The criticism that the length of the interval of time, as stated by Constine and Marmion, between their going into the oil room and the fire is "incredible," be-

cause the fire ought to have happened sooner than it did, is without foundation. Neither of them undertakes to give the exact time (*compare fols.* 70, 77, 85, 86). Gunther's testimony shows that the time which elapsed between the going into the oil room and the breaking out of the fire was very short (*fol.* 159). Estimates as to time under the circumstances attending a disaster are invariably inexact, as is notably the case in collision cases. The time must be measured by what occurred and not by attempted estimates of witnesses. The evidence shows that the drawing of the fluid began at once, that the pouring from one vessel to another was continuous and that the explosion and fire occurred as soon as the inflammable vapors reached the light of the lamp through the holes in the top of the lantern.

The door being left open, gave free access of fresh air from without.

IV.—If the sole question of fact in the case had been the cause of the fire, and the jury upon the evidence relating to it had found a verdict for the plaintiffs it would have been set aside as against the weight of evidence.

The positive and direct evidence of a witness not impeached or contradicted and not incredible on its face, cannot be disregarded by court or jury capriciously. "It is "the clear duty of the Court to set aside the verdict of a "jury founded on a disbelief of clear, uncontradicted and "undisputed evidence."

Lomer v. *Meeker*, 25 N. Y., 361.

Even where there may be "a scintilla of evidence in "support of a case, the question for the Court is not "whether there is literally no evidence, but whether there "is any evidence upon which the jury can properly pro-"ceed to find a verdict for the party producing it, upon "whom the onus of proof rests."

Improvement Co. v. *Munson*, 14 Wall., 442.
Pleasants v. *Fant*, 22 Wall., 116.
Commissioners v. *Clark*, 94 U. S., 278.
Dwight v. *Germania Life Ins. Co.*, 103 N. Y., 341, *p.* 359.
Schofield v. *Chicago & St. Paul R'way Co.*, 114 U. S., 615, *and cases cited, p.* 619.

In the case at bar the plaintiffs having given no evidence as to the cause of the fire and the defendant having given positive and direct evidence by the witnesses Constine and Marmion, showing that it was caused by an act prohibited by the conditions of the policies, the onus was thrown on the plaintiffs to overcome the effect of this evidence. Nothing was offered tending to contradict the evidence of Constine and Marmion, and the sole question was one of law as to the construction of the provisions of the policies.

There was, therefore, no error in the refusal to submit to the jury the question as to the drawing of the fluid in the presence of the lighted lamp.

Second Point.—The act of drawing the fluid by lamp light in the manner and for the purpose established by the undisputed evidence, was in direct violation of the conditions and provisions of the policies.

I.—The prohibition in the body of the policy against the using, keeping or allowing on the insured premises, without written permission, of gasoline, benzine, or any burning fluid or any inflammable product of petroleum was absolute excepting "the use of refined coal, kerosene or "other carbon oils for lights, *if the same is drawn and the "lamps filled by daylight*."

Policies, fols. 34, 41, 47, 54.

This Court has held that the above provisions amounted to a stipulation on the part of the insurance company that "it will not assume the risk arising from the presence of "the articles prohibited," whether brought on the premises by the owner or his tenant lawfully in possession under him (*L. & L. & G.* vs. *Gunther*, 116 U. S., *p.* 128).

II.—The terms of the conditions of the policies as to the limited use of kerosene oil which was permitted are specific and particular.

Kerosene oil is included in the general provision against "kerosene or carbon oils of any description whether crude "or refined." The only exception made is as to its being kept and used for lights, which clearly means for lights on the insured premises, and this permission so to keep and use it is again qualified by the special condition that the kerosene oil so kept and so to be used must be drawn by daylight, and further, that the lamps in which it is to be burned must be filled by daylight.

The insured premises were described in the policies as a hotel building with adjoining kitchen and pavilion, with the clause added "it is understood that the above prop-"erty is to be occupied by a family when not in use as a "hotel" (*Policies, fols.* 31, 44). A privilege was given to use gasoline gas generated at a distance from the hotel and without heat (*Id.*), but this was wholly outside of the conditions as to lighting fluids and oils (*see* 116 *U. S., p.* 131), and as said by the Circuit Judge, "this privilege does not "import that the insured may not also use kerosene for "lighting the premises under the conditions of the policy, "nor imply that he may keep or use it for any other pur-"pose or in any other way" (34 *Fed. Rep., p.* 503).

Third Point.—The privilege attached to the policies as a rider and pasted on the face of each policy—"*Privileged to use kerosene oil for lights; lamps to be filled and trimmed by daylight only*"—was not a waiver of the condition of the policy against drawing the oil by daylight. The privilege was not inconsistent with the condition, and imposed an additional restriction as to TRIMMING the lamps by daylight ONLY (*fols.* 42, 53).

I.—The policies and the privileges must be construed together in reference to the subject to which they relate, and the language employed to express the intention of the parties.

While courts will not be astute to find ways to work a forfeiture of a contract of insurance, and will rather strain

to uphold it, construing its conditions and provisions strictly against the underwriters, and refusing to enlarge a condition by construction so as to include what is not within its letter (per FOLGER, *J.*, *in McMaster* v. *North America Insurance Co.*, 55 N. Y., 222, *p.* 232), it is equally well settled that where the contract is expressed in plain, unambiguous language, and its object and design are reasonable and free from doubt, the courts will not "yield "their assent to a construction which denies significance "to the language, or permit or violates, the plain meaning "and intent of an unambiguous contract" (*Mack* v. *Rochester German Ins. Co.*, 106 N. Y., 560, *pp.* 564, 565).

The "privileges" must be read and construed in connection with the provisions in the body of the policies relating to the same subject, and the meaning of the contract "col-"lected from all within the four corners of the instru-"ment," *per* Lord CAMPBELL, *C. J.*, in *Warrington* v. *Early*, 2 Ell. & Blk., 763, *cited in Dewey* v. *Reed*, 40 Barb., 16, *p.* 21.

II.—The subject to which both the condition and the privilege related was the specially permitted use of kerosene oil for lighting the insured premises. Both the condition and the privilege restricted the use to this purpose solely, and the prohibition against keeping it or allowing it on the premises for any other purpose remained in full force. The privilege did not waive this prohibition or extend the permitted use of kerosene oil beyond the purpose expressed in the condition.

The condition provided that the kerosene oil thus to be used must be "drawn and the lamps filled by daylight." The privilege required the lamps to be "filled and trimmed by daylight only."

Inasmuch as the sole permitted use was for lights, necessarily involving the use of lamps, the only drawing of the oil would be in connection with the filling and trimming of such lamps, and the restriction of the condition was not relaxed, but was made more stringent by the requirement that the *trimming* as well as the *filling* of the lamps should be by daylight and by daylight only.

This added restriction in the privilege, coupled with the

provisions of the condition in the policies, confined the permission to use kerosene oil to its use for lights and confined the handling of the oil for this purpose to daylight.

The obvious danger and risk attending the use even of kerosene oil made the restrictions of the policies in regard to it imperative and necessary. They were customary and reasonable, and the privilege cannot be so construed that its effect shall be made to destroy the safeguard imposed by requiring the drawing the oil by daylight, at the same time that it made more stringent the requirement to fill and trim the lamps, for the sole use of which the oil was allowed to be used, by daylight.

But no permission whatever was given by the policy or the privilege to use kerosene oil or draw it for any other purpose than for lights on the insured premises, and the drawing it by lamplight into open wooden pails, to be carried to other premises, was wholly outside of any permission in either the policy or the privilege.

Fourth Point.—The written privilege on the margin of the policy No. 2,255,926, "*Privileged to keep not ex-*" "*ceeding five barrels of kerosene oil on said premises*" (*fol.* 42), did not conflict with the condition in the body of the policy or with the privilege attached to its face, nor annul the restriction as to the drawing the oil and filling and trimming the lamps by daylight.

I.—The privilege to use refined kerosene oil for lighting the insured premises, provided the restrictions as to day light were complied with, implied a permission to keep a reasonable quantity for that purpose.

The evidence showed that during 1878 the pavilion had been lighted by means of the gasoline apparatus and the gas generated thereby.

On discontinuing this mode of lighting a quantity of kerosene oil sufficient to supply lights in the absence of the discontinued gasoline would be required, and permission to keep five barrels was a proper precaution for the

insured in order to avoid any question as to the quantity permitted by the policy and the kerosene privilege attached to it.

II.—This privilege must also be construed in connection with the policy and the existing privilege and the subject to which they relate.

It cannot be enlarged so as to be made a waiver of the condition of the policy or the privilege pasted thereon in reference to the use of kerosene oil for lighting the insured premises.

The plaintiffs in error claim that the privilege of September 17, 1888, operated as if it read, "Privileged to keep "not exceeding five barrels of kerosene oil on said "premises, *and all restrictions in this policy and the "privilege heretofore attached thereto as to the use of "kerosene oil are hereby waived and annulled.*"

The construction thus contended for is wholly untenable. The privilege of September 17, 1878, speaks only as to the quantity of oil to be kept on the premises, and limits it to five barrels. It is silent in respect to the use or as to restrictions on the use. The use was already regulated by the contract as it stood, and nothing further was required unless these restrictions were to be annulled or modified, which was not done.

The use of the insured premises being unchanged, and the lighting by kerosene oil being the only purpose for which the oil was required, the restrictions as to its use for such purpose being those customary as to all premises where the privilege for lighting was given, there is nothing from which any intent on the part of the insurer or the insured can be inferred to waive or annul the reasonable and proper provisions of the policy and the lighting privilege.

This privilege of September 17, 1878, must, therefore, be construed according to its plain terms.

In *Savage* vs. *Howard*, 52 N. Y., 502, *p.* 504, the Court say :

"Contracts of insurance are construed so as to give "effect to the intent of the parties as indicated by the "language employed. They do not, in any respect, differ

" from other written instruments, but are interpreted by " the same rule, and one cardinal rule of interpretation " requires that words and phrases in contracts as well as " in statutes and other written instruments, shall be " taken in their ordinary popular sense unless they appear " to have been used in a different sense."

III.--Applying this sound rule of construction, what is the ordinary and popular signification of the word "keep"? Primarily it means simply "to retain in possession." But in ordinary speech it has a wider meaning according to the circumstances to which it is applied. "To keep a horse and carriage" means to possess a horse and carriage for the owner's personal use, while "to keep a livery stable" means, in the ordinary sense, to carry on the business of letting horses and carriages for hire. To say of a private householder "that he keeps claret or champagne," would imply that he has these wines on hand for the purposes of family use or the entertainment of friends, while the "keeping" of the same articles by a wholesale or retail grocer would imply that he had them in his stock for sale to customers.

To "keep" kerosene oil in a summer hotel to be occupied, when not so used, by a family, cannot be interpreted to mean anything else than the keeping for the purpose of lighting the premises. And, standing by itself, the privilege to keep five barrels of kerosene oil must be construed as a keeping for the only purpose for which it could be available or necessary on such premises, and no evidence was offered to show that it was needed or used for any other purpose.

But the contract itself, taken as a whole, leaves no room for doubt that this privilege to *keep* was not meant to qualify, waive or affect the existing conditions and restrictions as to *use* and method of use.

On the subject of kerosene oil it is perfectly plain and unambiguous.

Kerosene oil, although a product of petroleum, is excepted from the sweeping prohibition against the use or allowance of all such products on the insured premises, so far as to permit its use for lights, if drawn and the

lamps filled by daylight, and this permission of its use for lights occurs in the pasted privilege with the added proviso that the lamps must be trimmed as well as filled by daylight, and by daylight *only*. Five barrels of kerosene oil may be kept on the premises.

There is nothing inconsistent in the express provision that the kerosene oil shall be used only for lights and shall be drawn only by daylight, and that the lamps shall be filled and trimmed only by daylight, and the privilege to keep five barrels of the oil.

The real point of danger, as the event proved, was not in *keeping* the oil. This was perfectly safe, so long as no artificial light was brought into its vicinity. So the experts all testified. Nor was there danger in its *use* if the required precautions were observed. The danger was in handling it in the presence of artificial light. The plaintiffs' experts testified that the drawing of the oil into an open vessel and the pouring from one such vessel to another, thereby agitating the fluid and disengaging the fumes, was sufficient to have caused the fire. Thus the condition and restriction against drawing by artificial light is proved conclusively to have been an essential one, and there is nothing from which to infer an intent to waive it.

Fifth Point.—In respect both to the privileges pasted on the policies and the privilege of September 17, 1878, no construction can be given to them which would authorize the insured to draw and pour kerosene oil by lamp light into open pails for the purpose of lending the oil for use on other premises than those of the insured.

There is a class of cases relied on by the plaintiffs in error, where the printed conditions of the policy against the use of kerosene oil or of more inflammable lighting fluids, such as camphene, gasoline, benzine, naptha and the like, have been held to be waived by the written portions of the policy describing the subject of the insurance and the business of the insured, on the familiar principle

that the written portion of the policy where it is broader in its terms than the printed conditions, must be held to express the intention of the parties and the substance of the contract.

This was the ground of the decision in the cases of the insurance on the Harpers' printing establishment relied on by the plaintiffs in error. There the policies contained conditions prohibiting camphene for lights, but contained a privilege for a "*printing office, bindery and book store*," and it being proved that camphene was a necessary article in general use in the business of a printing office the Court held that as the insurance was directly on the stock in trade and articles used in that business the condition against the use of camphene for lights was not violated by its use in the printing office.

Harper vs. *Albany Mu. Ins. Co.*, 17 N. Y., 194.

And in *Harper* vs. *N. Y. City Ins. Co.*, 22 N. Y., 441, the Court expressly held that the privilege for the printing business was a privilege for use *for such business*, and therefore permitted.

See Opinion of Comstock, Ch. J., *p.* 443.

And see *Barnum* vs. *Merchants' Fire Ins. Co.*, 97 N. Y. 188.

Buchanan vs. *Exchange Fire Ins. Co.*, 61 N. Y., 26.

In the case last cited the policy prohibited the storing or using of petroleum, rock and earth oils, benzine, benzole and naphtha, without written permission. The premises were lighted by kerosene and a reasonable quantity for lighting purposes was on the premises when the fire occurred. It was held that the prohibition against "storing" did not prevent its use for lighting purposes (*p.* 29). The case, however, turned mainly on other provisions in the policy.

In *Bennett* v. *North British & Mercantile Ins. Co*, 81 N. Y., 273, the insurance was on a stock of wines,

liquors and cigars, and the fixtures and wearing apparel of the insured, who effected the insurance after inspection of the premises by an agent of the insuring company, who was informed by the insured and knew that kerosene oil was used for lighting them. The policy made no reference to kerosene oil by that designation, and the Court held that it could not "be supposed without imputing bad "faith to the defendants' agent, that the use of kerosene "oil for lighting was intended to be prohibited" (*p.* 275). "It is not a case," the Court say, "where the language "used unmistakably points to the use of kerosene (*p.* 276), and moreover, the loss was not occasioned by its use.

In *Steinbach* vs. *Lafayette Insurance Co.*, 54 N. Y., 90, the insurance was written on the insured's "stock of "fancy goods, toys and other articles in his line of business "as a German jobber and importer." The policy prohibited the storing or keeping of goods classed as hazardous, extra hazardous or specially hazardous. Fireworks were classed as specially hazardous. A privilege was written on the policy "to keep fire-crackers on sale." On proof that fireworks were articles in the line of the plaintiff's business, the Court held that they must be deemed included in the description of the insured property, and that the special privilege to keep fire crackers on sale was immaterial to the question of the construction of the written description of the property insured, and sustained a recovery by the plaintiff. This Court, however, in an action by the same insured, Steinbach, against another insurance company, on a policy containing similar provisions, affirmed the judgment of the United States Circuit Court for Maryland in favor of the insurance company holding, that upon the record brought up by writ of error from that Court fireworks were not included in the general terms used in the policy, and that it could not be properly claimed that they came within the description of "articles in the line of business" of the insured.

Steinbach vs. *Insurance Company*, 13 Wall., 183, *p.* 185.

In *Stout* v. *Commercial Insurance Company*, 12 Fed.

Rep., 554, saltpetre, a prohibited article, was kept on sale by the insured to the extent of 128 pounds, but the insurance as written in the policy was on a "wholesale grocer's "stock, comprising all articles kept for sale in such "stocks," with written permission to keep 50 pounds of gun-powder. Saltpetre was proved to be one of the articles belonging to a wholesale grocer's stock, and the quantity kept was a reasonable one.

The claim of the insured was sustained and the case distinguished by the Court from Steinbach's case in 13 Wallace, with obvious propriety; saltpetre being an article comprised in the ordinary stock of a wholesale grocer and so expressly included in the terms of the insurance; whereas, in the Steinbach case the insurance as written was not on the general stock of German jobbers and importers, but only on the stock in the particular line of business of the insured as a German jobber and importer, and the evidence did not warrant the Court in concluding that they were comprised in the special description of the policy as articles in his line of business.

The remark of BROWN, Circuit Judge for the Eastern District of Michigan, in *Plinsky* vs. *Germania F. & M. Insurance Co.*, 32 Fed. Rep., 47, *p.* 50, that the decision of the Steinbach case by this Court was "gravely doubted" in Stout *vs.* Insurance Co., 12 Fed. Rep., 554, is incorrect. The decision was not "doubted" in the Stout case, but was "distinguished."

The result of all the cases in reference to articles prohibited by the conditions of policies of insurance, but proved to be fairly comprised in the description of the property insured, is that when the specific terms of the insurance, as written in the policy, cover such articles as a part of the property on which the risk has been assumed by the underwriter, or when a written privilege has been given intended to cover the general use of an article without reference to the restrictions in the policy, the prohibitory or restrictive conditions of the policy are superseded and the broader terms of the written description or written privilege must govern, as expressing the intention of the parties in reference to the subject of insurance. But where the use of specially hazardous articles is permitted

under conditions, a written privilege to keep such articles does not affect the conditions as to their use, unless the plain intent of the parties was to waive or supersede them.

VII. – Kerosene oil having come into general use as a means of lighting, especially in the country, this use is contemplated by insurers, and the restrictions as to the use are intended as proper safeguards against carelessness and recklessness in handling it. They are such as ordinary prudence would dictate.

The keeping of kerosene by storekeepers and dealers is distinct from the use of kerosene for lighting dwellings.

Most of the cases have arisen where the question was as to keeping, and not as to the use or mode of use of the prohibited articles, and where the business of the insured was such as to make it clear that the intention was to permit the keeping for sale.

But in the absence of express proof from which such intention can be inferred the prohibitory or restrictive provisions of the policy control.

Matson v. *Farm Buildings Ins. Co.*, 73 N. Y., 310.
Beer v. *Insurance Co.*, 39 Ohio St., 109.
Birmingham Fire Ins. Co. v. *Kroegher*, 83 Pa. St., 64.
Lancaster Fire Ins. Co. v. *Lenheim*, 89 Pa. St., 497.
Pittsburgh Ins. Co. v. *Frazee*, 107 *Id.*, 521.
Carlin v. *Western Ins. Co.*, 57 Md., 515.
Collins v. *Farmville Ins. Co.*, 79 N. C., 279.

In *Putnam* v. *Commonwealth Ins. Co.*, 18 Bltchf., 368, the policy permitted the keeping of kerosene oils of a certain quality and on the specified condition, as in the case at bar, that the lamps should be trimmed and filled by daylight only (*p.* 378, *p.* 380). It was not found by the Referee before whom the case was tried that this permission had been departed from (*p.* 381, *at top*). The policy prohibited the "keeping or using" of naphtha. The Court held that as there was no naphtha on the premises at the

time of the fire, a previous use for a short time to light the premises and to show off on two occasions a naphtha-burning stove, for the sale of which the insured had an agency, was not a "keeping" within the meaning of the prohibition. The Court held that "the whole policy must "be construed together" (*p.* 381).

VI.—The express terms of both the policies defeat the claim of the plaintiffs that the privilege of September 17, 1878, operates as a waiver of the conditions and restrictions contained in the body of the policies.

Condition No. 6 provides that "the use of general "terms, or anything less than a distinct specific agree-"ment clearly expressed and endorsed on this policy, shall "not be construed as a waiver of any printed or written "*condition or restriction* therein."

This is a part of the contract, expressly intended to apply to such a privilege as this, and inasmuch as the privilege does not by its terms contain any waiver of the condition and restriction as to the *use* of kerosene, the Court will not add to it by construction or interpretation words of waiver or give it effect contrary to the plain engagement of the parties.

Effect must be given to this stipulation.

In *Riddlesbarger* vs. *Hartford Ins. Co.*, 7 Wall., 386, the Court says: "The contract of insurance is a voluntary "one, and the insurers have a right to designate the terms "on which they will be responsible for losses."

And in *O'Brien* vs. *Commercial Fire Ins. Co.*, 63 N. Y., 108, the Court say: "It is not a question whether the "condition is reasonable or unreasonable. It is lawful. "The assured has assented to it, and we cannot dispense "with it and make a new contract for the parties" (*p.* 112).

Sixth Point.—The test must be, in every case, the intention of the parties as expressed in the contract, viewed in the light of the circumstances surrounding it.

In *Williams* vs. *People's Fire Ins. Co.*, 57 N. Y., 274, Judge EARL says: "It would be of little use for the insurance company to expressly prohibit the sale or storage or the use of petroleum for lighting, if it could be kept on the premises for other purposes in great or large quantities, and with just as much danger without avoiding the policy. To test this case suppose petroleum not only increased the risk, *but had actually caused the fire*, it would then certainly have been very unjust to have held the defendant liable for the loss."

The case was one where the presence on the insured premises of petroleum in a small quantity, although not causing the fire, was claimed to have increased the risk, and the Court held that the question should have been submitted to the jury.

Here, as the case now stands, there is no question of increase of risk, but the principle applied in the case cited holds good because the fire was actually caused by the violation of the restriction as to the mode of use of the kerosene, and yet it is claimed by the plaintiffs that notwithstanding these restrictions and their violations the privilege to *keep* five barrels on the premises involved the right to use for any purpose, and to draw by any light.

And see *Matson* vs. *Farm Building Ins. Co.*, 73 N. Y., 310.

Sherry vs. *Springfield F. & M. Ins. Co.*, 26 Fed. Rep., 234.

In *Benedict* vs. *Ocean Ins. Co.*, 31 N. Y., 389, cited for the plaintiff in error, the written "privilege for $4,500 additional insurance" was held to be a waiver of the condition in the body of the policy requiring notice of additional insurance, because the object of that condition was accomplished by the privilege. As the Court say, the design of the written privilege was "to sanction in advance" additional insurance not exceeding $45,000, and was itself the notice thereof given and accepted as contemplated by the policy (*p.* 392).

In *Pindar* vs. *Continental Ins. Co.*, 38 N. Y., 364, the

plaintiffs' counsel seems to rely on the *dissenting opinion*, as the decision is a clear one to the effect that the condition of the policy prohibiting extra hazardous articles was left in full operation notwithstanding the extra hazardous article was part of the ordinary stock of a country store. (See *opinion of* WOODRUFF, *J., where he points out the very situation on which we rely, p.* 366.)

Goldwater vs. *Liverpool & L. & G. Ins. Co.*, 39 Hun, 176, was a case where the agent expressly waived the condition relied on as a defense. And the Court, referring to the condition that the use of general terms, &c. (same as condition No. 6 in the present case), shall not be construed as a waiver of any printed condition, holds that while it does not prevent an agent from waiving it, "it is one of "the general provisions of the agreement, and applies to "all the conditions and stipulations which may be found "in the contract" (*p.* 180), citing *Steen* vs. *Niagara Ins. Co.*, 89 N. Y., 315.

In *Hoffman* v. *Aetna Ins. Co.*, 32 *N. Y.*, 405, the language of a provision in the policy that a sale or conveyance of the insured property should avoid the policy, was held to be "vague and indeterminate," and not to interdict all sales, but only sales of proprietary interests, by the parties insured to parties not insured. Such was held to be the intention of the parties to the contract of insurance, and it was construed according to its intent.

Seventh Point.—This Court has held in this case that the privilege in the policy to *use* gasoline gas for the purpose of lighting the pavilion did not sanction the *keeping* of gasoline or its equivalent, except for actual use in the gasometer. No express permission to keep gasoline was given in the words of the privilege.

The Court say: "Such permission is implied only when "and because the use of gasoline is necessary to the en- "joyment of the privilege. Otherwise, and for all other "purposes and uses, it is expressly prohibited. The im-

" plication cannot be extended beyond the necessity for a " fair and reasonable exercise of the privilege granted " (116 U. S., *p.* 130).

In regard to kerosene oil, the privilege to keep not exceeding five barrels was expressly given, but as in the case of the implied privilege as to gasoline, this kerosene oil privilege cannot be extended so as to destroy the provisions as to the use of the same article.

Eighth Point.—In the case at bar, the fire and the resulting loss and damage were caused by a reckless and almost criminal act in direct violation of the policies.

Under the eye of the insured, Gunther, who was seated in full view of the oil room, and by the express permission and direction of his tenant, Walker, the so-called night-watchman, Schuchardt, went into the oil room, a depository of inflammable articles, with a lighted lamp, for the express purpose of filling two open pails with a fluid product of petroleum by lamplight and for the purpose of lending it to a neighboring hotel. Gunther made no protest and gave no warning. Walker told Schuchardt not to take the lamp into the room, and if he did, to be very careful (*Constine, fol.* 80; *Marmion, fol.* 87; " *all I heard Mr. Walker say to Schuchardt was, to be careful* "). Without heeding the warning, Schuchardt, after first placing the lamp on the door sill, moved it nearer the barrel from which he was drawing. Constine again warned him (*Constine, fol.* 67; " *I told him to be careful, and he told me to* " *mind my own business, and he put the lamp over nearer* " *the barrel of oil* "). Then came the explosion.

This is not a case where an insurance company by a technical defense, or by invoking finely printed conditions of its policy to which the attention of the insured may not have been directed (*Slaughter* vs. *Ins. Co.*, 12 Wall., 404, *p.* 407), or by arbitrary requirements foreign to the cause of the loss, seeks to defeat an honest claim. On the contrary, it is a case of the breach by an inexcusable and fool-

hardy act of a carefully prepared and perfectly understood contract, having special reference to the very element of danger which caused the fire.

Ninth Point.—None of the exceptions taken by the plaintiffs at the trial to the rulings of the Court in reference to the admission or rejection of evidence, are available in this Court. The case having finally turned upon the question of law whether upon the undisputed evidence the defendant was entitled to the direction of a verdict without reference to the disputed question of fact as to the presence of gasoline or benzine on the insured premises, that question was wholly unaffected by any of the evidence relating to the gasoline or benzine question.

Nor is there any exception to any ruling of the Court in reference to the testimony of Constine or Marmion or the other witnesses as to the occurrences leading up to what took place in the oil room, which can avail the plaintiffs in error. These exceptions related merely to the fact testified to by these witnesses, that the Bath Park Hotel was out of gasoline and that the sole object of their errand to the Atlantic Hotel, and their visit to the Locust Grove Hotel, was to get gasoline in return for what had been previously borrowed by Schuchardt (*fols.* 65, 66, 68, 69, 77, 78, 83, 117, 118, 119, 120). This had an important bearing on the question whether gasoline or benzine were allowed on the insured premises, but as the Court below held in directing a verdict for the defendant, that it must be assumed that the fluid drawn in the oil room was not gasoline or benzine but was kerosene oil, the result was not affected in any manner by any of the evidence relating to gasoline as the article which Constine and Marmion were in quest of. The ruling by which a verdict was directed for the defendant was based on the undisputed fact testified to by Gunther, the insured himself, that a lighted lamp was carried into the oil room, and that an explosion and fire immediately thereafter occurred, and the testimony of Con-

stine and Marmion that a fluid which produced the explosion and fire was drawn in the oil room in the presence of the lamp.

Tenth Point.—In Answer to Brief of Plaintiffs in Error.

I.—The criticisms of the counsel for the plaintiffs in error on the testimony of Constine and Marmion have been, we submit, sufficiently answered. (*See First Point, supra, p.* 13.)

There is no ground for the allegation on page 17 of the plaintiffs in error's brief that "the whole defense is "founded upon the testimony of two witnesses whose "testimony was manifestly false and most of it manufac-"tured for the occasion."

The facts conceded by the plaintiffs below and proved by their own witnesses, *viz.:* that the fire originated in the oil room in the presence of the lighted lamp carried into the room by Schuchardt, the night watchman, by direction of Walker, the tenant, and in the presence of Gunther, the insured, establish beyond controversy the cause of the fire as arising from a direct violation of the provisions of the policy.

II.—The claim of error by the Court below in assuming as an established fact that it was "about dusk" at the time the kerosene was drawn, and that in fact the testimony showed it was daylight when the fire occurred, is wholly untenable. The fire occurred after sundown, and as the insured himself testified, "about dusk" (*Gunther, fol.* 159). Irrespective of this and whether it was daylight or not, the fluid drawn in the oil room was not drawn *by daylight*, because drawn by the light of the lamp. Had the fire occurred at noonday the conditions of the policy would have been violated if the drawing of the fluid which caused the fire had been by lamplight instead of daylight. There was no dispute as to the pres-

ence of the lighted lamp in the oil room or its being the cause of the fire, and the question as to the amount of daylight was wholly immaterial.

III.—There is no force in the criticism attempted in the Third Point of the brief for plaintiffs in error, that the conditions of the policies were not broken by the drawing of the kerosene by lamplight, because an express positive prohibition against using artificial light is not included. The case cited, of *Jones* v. *Howard Ins. Co.*, 10 N. Y. State Rep., 120; S. C., 18 Ins. Journal, 885, while containing the words "without use of artificial light," did not thereby make the prohibition against drawing by lamplight any more specific than that contained in the policies in question, which provide that they shall be null and void unless the permitted fluid "is drawn and the lamp filled by daylight;" the further provision "lamps to be filled and trimmed by daylight ONLY" emphasizing and making more clear the prohibition in the body of the policy.

IV.—The Fourth Point of the brief for the plaintiffs in error deals with the privilege pasted on the policies and with the privilege of September 17, 1878, written on the face of policy No. 2,255,926. The construction of these privileges has been, we submit, sufficiently considered in this brief (*supra, Fourth and Fifth Points*).

V.—Most of the cases cited in the Fifth Point of the brief of the plaintiffs in error have been analyzed in this brief. An examination of those not so analyzed will show that they have little bearing on the real points in controversy in the present discussion.

VI.—There is no warrant for the claim set up by the Sixth Point in the brief for plaintiffs in error, that in case of reversal for error at the trial, judgment can be entered in this Court for the plaintiffs against the defendant for the amount due upon the two policies, with interest. At the close of the whole case at the trial the defendant below insisted that, irrespective of the disputed fact in the case as to the presence of gasoline or benzine on the in-

sured premises, the defendant was entitled to a verdict because the fluid drawn in the oil room, whatever it was, was so drawn against the express prohibition of the policies against drawing kerosene otherwise than by daylight. The plaintiffs claimed the right to go to the jury on the disputed question as to gasoline or benzine. At this stage the Court granted the motion to direct a verdict for the defendant, not on the ground that there was no disputed question of fact in the case, but, that irrespective of such disputed question of fact, the defendant was entitled to a verdict upon those facts which were undisputed. It was not the case of a demurrer to the whole evidence, and the cases cited are inapplicable.

The statement in the brief of the plaintiffs in error (*page* 6) that the defense of the defendant as to the presence of gasoline or benzine on the insured premises "*was abandoned at the end of the trial*" is wholly without foundation. This issue has been contested at every trial, and the weight of the evidence clearly established this defense at the last trial, showing the purchase of the half-barrel of benzine by Walker, its delivery to him at the insured premises along with the barrel of kerosene and its presence in the oil room the day before the fire. Also the use of benzine for a fortnight before the fire in the torches on the pavilion, the errand of Constine and Marmion to get gasoline for the tank at the Bath Park Hotel in return for what Schuchardt had shortly before borrowed. The expert testimony was conclusive to the point that gasoline or benzine caused the fire.

The record shows that the case was tried out on this gasoline and benzine question, and had not the Court been satisfied of the violation of the conditions as to the drawing of the kerosene, the question of the presence of gasoline or benzine would have been submitted to the jury.

If there was error in the direction of a verdict on the branch of the case which the Court, on its construction of the policies, held to be decisive, irrespective of the further defense, this can only lead to a new trial, on which the defendant will be entitled to have its other defense passed upon by the jury.

The question as to gasoline or benzine remains open, the jury not having passed upon it and the Court having refused to submit it to them.

This is not the case of a request by both sides to take the case from the jury, and the chief ground of error assigned by plaintiffs in error is that the Court refused to submit to the jury the questions of fact.

Eleventh Point.—The judgment of the Circuit Court should be affirmed, with costs.

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Of Counsel.

Office Supreme Court U. S.
FILED.
JAN 22 1890
JAMES H. MCKENNEY

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1367.

AMELIA A. GUNTHER AND GEORGE A. GUNTHER, EXECUTORS OF THE LAST WILL AND TESTAMENT OF C. GODFREY GUNTHER, DECEASED, PLAINTIFFS IN ERROR,

vs.

THE LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY.

OPINION OF HON. E. HENRY LACOMBE, JUDGE OF THE UNITED STATES CIRCUIT COURT FOR THE EASTERN DISTRICT OF NEW YORK, AS REPORTED IN THE 34 FEDERAL REPORTER, P. 501, REFERRED TO IN THE RECORD IN THIS CASE AND DIRECTED TO BE PRINTED BY THE COURT.

C. BAINBRIDGE SMITH, *for Plaintiffs.*
WILLIAM ALLEN BUTLER, *for Defendant.*

LACOMBE, *J.*—When the testimony in this case was closed, defendant moved for the direction of a verdict. The court was inclined to grant such motion on the ground that it appeared by uncontradicted evidence that the cause of the fire was the drawing of kerosene by lamplight. Inasmuch, however, as much testimony had been introduced bearing on another defense, viz., the presence or use of gasoline or benzine on the premises, the motion was denied, with leave to renew after verdict as a motion for direction of judgment. All question as to the drawing of kerosene by lamplight was withdrawn from the jury, and upon plaintiffs' case, and the other defense, their verdict was for the plaintiffs. The defendant now moves for a new trial on the same ground as that urged when the case was closed; not making the motion reserved to it, for the reason that such motion is "not in consonance with Federal practice," because a compulsory nonsuit is not permitted here, and its practical equivalent —the power to direct a verdict—does not exist after verdict rendered. Under the authorities it is no doubt true that the very same process by which a State judge nonsuits a plaintiff on the

whole case on grounds of law, is called the "directing a verdict," when practiced by a Federal judge: Oscanyan *vs.* Arms Co., 103 U. S., 261. It would be matter of regret, however, if the Federal courts should by sticking in the bark of mere verbal dialectics be unable, despite section 914, Rev. St., to avail themselves of a State practice so simple, sensible, and efficient as that of directing judgment of nonsuit upon reserved points of law after verdict: Shepherd *vs.* Bishop, 6 Bing., 435; Downing *vs.* Mann, 3 E. D. Smith, 36; Insurance Co. *vs.* Minard, 2 N. Y., 98; Shellington *vs.* Howland, 53 N. Y., 371. By the refusal of the court, however, to charge his last five requests, and by the denial of his motion to direct a verdict in his favor, counsel for the defendant is entitled to apply for the relief he now asks.

Neither the plaintiffs' extended argument, nor a careful examination of the authorities cited in his brief, has altered the opinion expressed on the trial. The circumstances under which the fire originated were these: On August 15, 1879, two servants belonging to the Bath Park Hotel, situated about a mile distant, came to Walker, the proprietor and occupant of the insured premises, to borrow some kerosene oil. [There was considerable conflict of testimony as to whether it was kerosene or gasoline which they came to get; but the jury has found that there was no gasoline on the premises, and this motion will therefore be determined upon the assumption that the oil on the insured premises was kerosene.] Their request was acceded to, and they were referred by Walker to one of his employes, who was directed to supply their need. With two common open wooden pails, which they had brought to carry the oil in, and accompanied by Schuchart, Walker's employe, carrying a lighted lantern, the Bath Park employes went to the "oil-room." In this room, which was generally under Schuchart's charge, there was a barrel of kerosene, a can, some old rubbish, and a stand on which lamps could be filled. It was under what was known as the "pavilion," its floor a foot or so below the level of the ground, apparently without a window, and entered by a narrow door. Schuchart first set his light—an ordinary stable lantern, with holes in the top—upon the door-sill, and began to draw into the pails. The first of these leaked; considerable oil was spilled, and its contents were then poured into the second pail. About this time the lamp was brought from the door-sill nearer to the barrel, and shortly afterwards—only a few minutes after the party entered the oil-room—there ensued an explosion and conflagration by which the premises were totally destroyed. There was some conflict as to the precise time of explosion, but all the testimony showed that it was about dusk, darker in the oil-room than it was outside, and there is no dispute but that the oil was not being drawn by daylight only.

Is a loss so caused covered by the policy? It is undoubtedly true that written clauses and riders will prevail over the ordinary printed forms of insurance contracts, and that as the contract is an instrument prepared by the insurer, all doubts or ambiguities

are to be resolved against him. But the two essential rules of interpretation, which are the headlights under which all written instruments should be construed, are just as applicable to contracts of insurance as to any other agreements—the whole document must be considered, and it must be construed so as to give effect to the intent of the parties as indicated by the language employed. The contract in suit, which covered a summer hotel, used as a dwelling-house in the winter season, was on one of the ordinary printed forms of policy used by the defendant. It contained, as such policies usually do, many carefully drawn provisions, paragraphed and numbered, restricting the operation of the contract, and saving the company from claims for loss arising under circumstances which exposed them to some unusual hazard which they were not willing to accept. One of these paragraphs is as follows:

> 11. * * * Petroleum, rock, earth, coal, kerosene, or carbon oils of any description, whether crude or refined, benzine, benzole, naphtha, * * * or any other inflammable liquid are not to be stored, used, kept, or allowed on the above premises, temporarily or permanently, for sale or otherwise, unless with written permission indorsed on this policy, excepting the use of refined coal, kerosene, or other carbon oil for lights, if the same is drawn, and the lamps filled, by daylight. Otherwise this policy shall be null and void.

This paragraph declares its meaning with no uncertain sound. First, it absolutely prohibits, except upon written permit, the "storing, using, keeping, or allowing" of kerosene and certain other oils on the premises, temporarily or permanently, and for any purpose whatever ("for sale or otherwise"). It next makes an exception in favor of kerosene, but with clearly expressed restrictions: (a) The kerosene so kept is to be used for lights. It is not to be kept "for sale," or kept or used "otherwise," except for lights; and manifestly for lights on the insured premises. (b) The kerosene which might thus be kept "for lights" is to be drawn by daylight. (c) The lamps in which the kerosene kept "for lights" is burned must be filled by daylight. (d) As to any other manipulation of kerosene which is necessary to its use "for lights," the paragraph above quoted is silent. The next inquiry is whether elsewhere in the contract there is anything so inconsistent with the terms of this paragraph as to make the meaning of the contract doubtful even; for doubts will be resolved against the insurer. The general description of the property, viz.: "The two-story frame hotel building, with one story frame kitchen and two story pavilion adjoining and communicating, situate on Gravesend Bay, at Bath, Kings Co., L. I., [it is understood the above property is to be occupied by a family when not in use as a hotel]"—is certainly not inconsistent with a provision restricting the keeping and use of kerosene to the single purpose of lighting the premises. In that respect the case at bar differs from the Harper cases and the others cited, where the ordinary use of such premises, as the policy described or the survey disclosed,

was inconsistent with the restrictions of the printed form. Nor does the provision as to special means of lighting, which was written in with the description of the premises, present any such inconsistency. The "privilege to use gasoline gas, gasometer, blower, and generator, being underground about sixty feet from main building, in vault; no heat employed in process,"—does not import that the insured may not also use kerosene for lighting the premises under the conditions of the policy, nor imply that he may keep or use it for any other purpose or in any other way.

It further appears that at the time of issuing the policy there was attached to it a rider containing a customary privilege attached generally to policies, and expressed as follows: "Privileged to use kerosene oil for lights; lamps to be filled and trimmed by daylight only." What effect has this upon the provisions of paragraph 11, above quoted? In the first place it imposes an additional restriction upon the insured, for it forbids the "trimming" except by daylight. Paragraph 11, by its silence, permitted trimming—an operation not wholly free from danger when conducted by artificial light—at any time. The rider is thus susceptible of intelligent interpretation, without finding its sole meaning in the endeavor to dispense altogether with the kerosene clause of the policy. In view of the rule of construction which requires us to consider the whole contract, the meaning of this rider is to be determined only after its terms are collated with paragraph 11, above quoted. When this is done, it will be at once seen that there is nothing in it which will warrant the contention that kerosene may be kept "for sale," or kept or used "otherwise" than for lighting the premises. These buildings certainly could not be used as a storehouse from which might be obtained the oil necessary to light some other premises, even if those other premises were used by the assured. The lights in which the kerosene—which the assured was thus authorized to keep—was to be burned, were to be filled with that kerosene by daylight only. The rider is silent as to drawing. The sounder interpretation would seem to be that, as to drawing, the original form, being unmodified by any inconsistency in the rider, should control; but even if the effect of silence in the rider on that subject is to make the whole contract silent as to the time of drawing kerosene under the privilege, then the utmost that can be claimed for the privilege given to the assured under the rider and contract is this: "You shall not," says the insurer, "keep or use kerosene oil for sale, or any other purpose except that of lighting the premises. As to the oil which you thus use for lighting, you must not pour it into your lamps except by day light; but we do not care when you draw the kerosene which we thus allow you to fill your lamps with." In view of the testimony in this case, such a clause would probably have afforded abundant protection to the insurer. If the lamps were not to be filled except by daylight, no one would be likely after dark to draw oil, which could not be poured into them

till the next morning. And no one who was drawing oil with which to fill the lamps of that hotel would be likely to draw it in an open wooden pail, or otherwise than into a can such as might be thereafter conveniently used as an instrument for filling the lamps. The expert testimony shows that such a mode of drawing would be quite safe, and that it is only the agitation and exposure of a broad surface of the liquid which renders the presence of a light dangerous. The kerosene oil which took fire in this case, however, was being drawn for no such purpose; and the language of the rider cannot be stretched so far as to cover a loss caused as this was, by operations not allowed by the policy.

Finally, plaintiffs sought to sustain their case on the terms of another rider, written on the margin of the policy, at the close of the season of 1878, when the assured decided to give up lighting any part of the premises with gasoline. It reads as follows: "Privileged to keep not exceeding five barrels of kerosene oil on said premises." There is nothing in this clause, however, at all inconsistent with the restrictions as to drawing which the policy contains. Nor does it at all import a keeping for any purpose other than that already provided for, viz., the lighting of the premises. It merely provides how much kerosene may be kept under the general license to keep, implied in the kerosene clause and the rider. It is not concerned either with the uses or manipulation of the oil so kept. The clause and both riders stand perfectly together.

The motion should be granted; and if, under the Federal practice, a judgment cannot now be directed for the defendant on the point reserved, a new trial will be ordered.